

SOVEREIGNTY COSTS: CHINA'S APPROACH TO LEGALIZED DISPUTE RESOLUTION
IN INTERNATIONAL TREATIES

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This dissertation examines the conditions under which China is likely to accept institutional constraints on sovereignty and ratify international treaties with mandatory dispute settlement mechanisms (DSMs). Specifically, why did China ratify the United Nations Convention on the Law of the Sea (UNCLOS) and accept legalized Bilateral Investment Treaties (BITs) beginning in the mid-1990s, but vote against the Rome Statute of the International Criminal Court (ICC) in 1998? A comparative case study shows that China delegates disputes only in non-core sovereignty issue areas, where sovereignty costs are relatively low, but not in core sovereignty issue areas, where such costs are deemed to be too high. The primary driving force for China's changes regarding non-core control rights is the evolution of its new strategic interests, which increases the material benefits and partially offsets the sovereignty costs of signing and ratifying hard laws. Meanwhile, China's acceptance of the social legitimacy of an international treaty or a boundary-trespassing norm incrementally lowers the normative premiums—the ideational dimension of sovereignty costs—of delegation, and complements the material factors in driving changes. However, as China is still in a weak socialization process and has not fully internalized or accepted the normative legitimacy of alternative boundary-trespassing norms, the normative premiums of deviating from the Westphalian sovereignty cannot be significantly reduced, and China cannot accept highly legalized treaties without making reservations to lower the sovereignty costs. Accordingly, if a treaty's legalized DSM is balanced with flexible exclusion

and reservation clauses, allowing states to exempt disputes regarding core sovereignty and minimize sovereignty costs, China is more likely to ratify the treaty (as with the UNCLOS and legalized BITs). If a treaty does not allow any reservations and may have negative impacts on core sovereignty rights, China will not hesitate to reject it (as with the Rome Statute).

BIOGRAPHICAL SKETCH

Jing Tao was born in Beijing, China. She graduated from Peking University in 2000, with a B.A. in Political Science and a B.A. in Economics. She also earned a M.A. in Political Science from Peking University in 2003 and a M.A. in Political Science from Cornell University in 2008. She received her Ph.D. from the Government Department at Cornell University in 2013 with a specialty in International Relations.

For My Parents

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TABLE OF CONTENTS

CHAPTER ONE: Sovereignty Costs, Material Interests and Legitimacy: Explaining China's	
Approaches to the Delegation of Dispute Resolution in International Treaties	1
1. Three Dimensions of Sovereignty	4
2. Sovereignty Costs	10
3. Sovereignty Costs and Core and Non-Core Sovereignty	19
4. Sovereignty Costs and Boundary-Trespassing Behaviors of States	31
5. Research Design and Methodology	52
CHAPTER TWO: Overseas Investment and Economic Globalization: China's Changing Policies	
on Legalized Bilateral Investment Treaties	77
1. The BITs and the Liberalization of Foreign Investment	79
2. The Evolution of China's Positions on BITs	85
3. China's "Going Out" Strategy and the New Material Benefits of Legalized BITs	90
4. Economic Globalization and Reduced Normative Premiums of Legalized BITs	97
5. Sovereignty Costs and China's Reservations to Legalized BITs	111
6. Conclusion	118
CHAPTER THREE: State Sovereignty vs. Human Rights: China's Opposition to the Rome	
Statute of the International Criminal Court	120
1. ICC as an Institutional Innovation	122
2. China's Positions on the ICC during the Negotiations	126
3. Superiority of State Sovereignty over the Human Rights Norm	131
4. High Sovereignty Costs of the Rome Statute on China	138

5. Conclusion	151
CHAPTER FOUR: Maritime Rights and the International Order of the Sea: China's Decision Making on Signing and Ratifying the United Nations Convention on the Law of the Sea	153
1. The UNCLOS and the New International Maritime Order	154
2. China's Positions on the UNCLOS during the Third UN Conference on the LOS	161
3. China's New Material Interests and the Rising Benefits of Ratification	172
4. Social Legitimacy and China's Ratification of the UNCLOS	178
5. Core Sovereignty and China's Reservations to the UNCLOS	187
6. Conclusion	197
CHAPTER FIVE: Conclusion	199
1. China's Behavioral Patterns in Sovereignty and International Treaties	201
2. China's Changes and Continuities in the Last Decade	216
3. The Generalizability of the Theoretical Framework in Cross-Country Analysis	227
4. Conclusion	232
REFERENCES	235

LIST OF FIGURES

Figure 2.1: The Number of BITs China Signed (1982-2011)	86
Figure 2.2: China's Foreign Exchange Reserves from 1980-2000 (billion USD)	92
Figure 2.3: China's Foreign Exchange Reserves from 1996-2011 (billion USD)	92
Figure 2.4: Number of Times "Globalization" Appears in <i>Selected Works of Jiang Zemin</i>	98
Figure 2.5: Number of Times "Competition" Appears in <i>Selected Works of Jiang Zemin</i>	113
Figure 4.1: Maritime Zones	157
Figure 4.2: Number of Ratifications (1982-2009)	186

LIST OF TABLES

Table 1.1: Three Dimensions of Sovereignty and Sovereignty Costs	10
Table 1.2: Core and Non-Core Sovereignty	24
Table 1.3: Core and Non-Core Sovereignty and China's Approaches to Delegation	29
Table 1.4: China's Approaches towards Legalized Treaties	52
Table 2.1: Sovereignty Costs and Legalization Degrees of BITs	90

Chapter One

Sovereignty Costs, Material Interests and Legitimacy: Explaining China's Approaches to the Delegation of Dispute Resolution in International Treaties

China's approach to state sovereignty seems full of riddles. In the face of the boundary-trespassing Western states, it has often advocated Westphalian state sovereignty. Yet, on other important issues, China's sovereignty stance has been less unyielding. Such different attitudes and practices are reflected, in particular, in China's approaches toward three types of international treaties that intrude on sovereignty with their mandatory dispute settlement mechanisms (DSMs): the Bilateral Investment Treaties (BITs), the United Nations Convention on the Law of the Sea (UNCLOS), and the Rome Statutes of the International Criminal Courts (ICC).

Although China signed more than 90 BITs in the 1980s and the early 1990s, all those BITs did not contain national treatment clauses and provided for only very limited degrees of delegation. Only starting in the late 1990s, China has granted foreign investors national treatment and agreed to delegate all investment-related disputes to international arbitration. In the case of UNCLOS, China participated in the negotiation in the 1970s and signed the treaty in 1982; yet it did not ratify the treaty for more than a decade. China's stance began to change when it applied for "pioneer investor" status in deep-seabed mining, a regime China had opposed strongly during the initial negotiation. This change, among others, paved the way for China to finally ratify the treaty in 1996. In contrast to its relatively flexible policies on the BITs and UNCLOS, China had continued to hold to a nearly unyielding sovereignty stance during the negotiations of the Rome Statute. Although most states that participated in the Rome Conference supported the treaty,

China, together with only six other states, cast negative votes in 1998.

International treaties with mandatory delegation mechanisms reflect an ongoing legalization of world politics. Highly legalized treaties are hard law in that they define rules unambiguously, bind states strongly, scrutinize their behaviors through international and domestic legal mechanisms, and delegate broad authority to independent legal entities to implement the rules they contain (Goldstein et al 2000: 387). Delegation mechanisms strengthen the enforceability of international law. When states ratify a treaty with mandatory DSM, they formally commit to accept independent legal institutions as the highest authority in adjudicating disputes. In some circumstances, even private actors such as individuals, firms, and NGOs can bring cases directly to international courts or arbitration panels and thus further limit states' decision-making autonomy (Keohane, Moravcsik, and Slaughter 2000). Since treaties with delegation requirements impose higher sovereignty costs on states than treaties without such mechanisms, they are better settings than soft laws to gauge the depth of states' integration with the international society and to differentiate the relative weights of material and ideational factors in driving boundary-trespassing changes of individual states.

In this dissertation, I intend to explain both the cross-sectional and the time-series variations of China's approaches to international treaties with mandatory DSMs. In the issue dimension, I examine why China has been more flexible to the BITs and the UNCLOS, but flatly rejected the Rome Statute of the International Criminal Court (ICC). In the time dimension, I account for why China has changed its conservative stances and been willing to accept legalized BITs and ratify the UNCLOS since the late 1990s.

I argue that the key to answering these questions and to understanding the changes and continuities of China's approaches to sovereignty is the concept of sovereignty costs, which can

be defined as the costs of giving up sovereign control rights and decision making autonomy to other parties. Sovereignty costs can be broken down into two parts: the substantive values of the control rights being ceded, and the additional normative “premiums” due to deviations from the Westphalian norm.

The values of the two components of sovereignty costs vary across different types of sovereignty. Both the inherent values of control rights and normative premiums are higher for core than for non-core sovereignty. And boundary-trespassing changes at both the systemic and the unit levels are more likely to happen in non-core than in core sovereign issue areas. States will tolerate certain degrees of sovereignty loss if the expected gains can offset some portions of sovereignty costs, or if normative premiums decrease due to the weakening of states’ sovereignty beliefs; but they will not cede their control rights and decision-making autonomy unlimitedly without adequate compensations.

There are two primary findings of this study: first, although China has continuously deepened its integration with international institutions, the sovereignty norm still plays an important role in determining its interests and identity: changes in China’s approaches to legalization are more likely if its core sovereignty of jurisdictional and territorial control rights are not at stake. Accordingly, China delegates disputes only in non-core issue areas, where sovereignty costs are relatively low, but not in core issue areas, where such costs are deemed to be too high. Second, the primary driving force for China’s changes regarding non-core control rights is the evolution of its new strategic interests, which increases the material benefits and partially offsets the sovereignty costs of signing and ratifying hard laws; meanwhile, China’s acceptance of the social legitimacy of an international treaty or a boundary-trespassing norm incrementally lowers the normative premiums of delegation and complements the material

factors in driving changes. However, as China is still in a weak socialization process and has not fully internalized or accepted the normative legitimacy of alternative boundary-trespassing norms, the normative premiums of deviating from the Westphalian sovereignty cannot be significantly reduced, and China cannot accept highly legalized treaties without making reservations to lower the sovereignty costs.

This chapter begins in Part 1 with a review of different dimensions of sovereignty and moves to an analysis of the concept of sovereignty costs in Part 2. It then classifies sovereign control rights into core and non-core categories based on the sovereignty costs of ceding different types of control rights, and applies the categorization in explaining issue dimensional variations of China's decision making in Part 3. Part 4 examines under what conditions sovereignty costs can be offset or reduced by material and ideational boundary-trespassing factors and explains the time-dimensional changes of China's policies towards the BITs and the UNCLOS. Part 5 discusses research design and methodology and lays out the structure of this dissertation.

1. Three Dimensions of Sovereignty

Sovereignty is probably one of the most confusing concepts in the field of political science. Fruitful discussions and debates on important issues related to sovereignty are often hindered by the confusion of multi-dimensional meanings of the concept. When discussing the changes and continuities of state sovereignty, it is of paramount importance that we differentiate which dimensions of sovereignty have evolved over time and which are more stable and persistent.

Scholars in the International Relations (IR) field in the last two decades have been more aware of the multi-faceted nature of sovereignty and tried to analyze the meaning of the concept. However, different schemes proposed to categorize sovereignty may introduce new confusion

alongside the problems they try to solve. Some categorizations classify the meanings of sovereignty into several basic dimensions, while others try to categorize one specific dimension of the concept. Therefore, typologies of sovereignty do not always refer to the same object.

I want to clarify the different dimensions of the meanings of sovereignty at the outset, based on the existing definitions and categorizations of the concept in prior literature. I argue that there are three basic dimensions of state sovereignty: legal standing of statehood, control rights and authority, and norms or organizing rules of sovereign rights.

First, the legal aspect of sovereignty refers to the legal standing of statehood acquired through mutual recognition of sovereign states. Krasner calls this “international legal sovereignty” (1999), and Sorenson names it “constitutive rule of sovereignty” (1999). Recognition from other sovereign states is the necessary and sufficient condition for a political entity to gain the legal standing of statehood, or juridical independence. Although territory, population, and government are often considered as basic elements of a state (Jackson 1990: 55; Sorenson 1999: 592), they are neither necessary nor sufficient for a political entity to gain legal sovereignty. States are recognized as being “juridically equal” even if they are different in size, power, political regime, and real control over territories and domestic affairs (Thomson 1995: 219; Sorenson 1999: 592).

James (1999) and Sorenson (1999) point out that “constitutional independence” as the constitutive rule of sovereignty has never changed in international relations. Legal sovereignty is absolute and indivisible for a state: a political entity either has it, or it does not. Without international legal sovereignty, a political entity cannot legitimately be called a state. However, what has changed regarding the legal aspect of sovereignty is the criteria of recognition. In fact, there has never been a fixed common standard of recognition. As Krasner correctly points out,

recognition is often a political action of states and can be used strategically for instrumental purposes (1999). Some constructivists treat state practices of recognition in day-to-day interactions as a major way of social construction of sovereignty (Biersteker and Weber 1996). Yet, what such activities construct are the rules and standards of recognition, not the legal sovereignty itself. Regardless of diverse political motivations for states to recognize each other or different criteria of recognition constructed through states' practices, recognition is the sole legal action granting a political entity the legitimate status of statehood. Legal sovereignty ensures that states are formally or juridically equal and independent.

The second basic dimension of sovereignty refers to the authority and control rights that states possess over their territory, population, and all types of activities within their borders. Control rights are different from real control or the capability of control. It is a relational and legal concept emphasizing "rights" as mutually recognized, legitimate authority. Sovereign control rights of states are logically subsequent to and bestowed by their international legal sovereignty. Recognition grants states not only the legal standing of statehood, but also the exclusive authority of control over domestic affairs and absolute autonomy in exercising control rights. The initial autonomy allows states to voluntarily transfer their control rights, enter into binding agreements, and accept boundary-trespassing international norms and practices in subsequent interactions with other sovereign states. Cooley and Spruyt characterize the authority dimension of sovereignty as consisting of "a bundle of rights" which, "like property rights ... can be split or shared by states and other international actors" (2009: xi). The authority dimension of sovereignty can diminish without impairing the legal sovereignty of states, as long as the action of ceding control rights is voluntary.

According to Carlson, the bundle of control rights can be further broken down into four

distinctive types of rights: territorial sovereignty, jurisdictional sovereignty, sovereign authority, and economic control rights (2005). These types of rights have always been the components of state sovereignty, and the authority dimension of sovereignty has rarely changed in international relations. Sometimes, scholars have called a state lacking full control rights a “semi-sovereign state” (Katzenstein 1987) or “quasi-state” (Jackson 1990). We can tell whether a state’s sovereignty is complete or partial, exactly because the components of control rights and authority have been persistent; otherwise, we cannot claim that a state ceding parts of its control rights does not enjoy full sovereignty.

The third basic dimension of sovereignty refers to the norms of sovereignty, that is, the organizing rules and principles of sovereign rights and authority. The default and most entrenched sovereignty norm in the international society is the Westphalian norm, which, according to Krasner, is based on two principles: “territoriality and the exclusion of external actors from domestic authority structures” (1999: 20). Under the Westphalian system, sovereign rights are in theory indivisible and non-transferable: states should always enjoy absolute autonomy within their own territories without interference by other states.

Westphalian sovereignty is often associated with international anarchy. In Kenneth Waltz’s *Theory of International Relations*, he takes Westphalian sovereignty as given, arguing that each state “decides for itself how it will cope with its internal and external problems” (1979: 81); “each state, like every other state, is a sovereign political entity” (1979: 92). Starting from this assumption, Waltz’s theory constructs an anarchic international system based solely on the distribution of material capabilities among states. Differently from Waltz, Hedley Bull’s theory of “anarchic society” treats Westphalian sovereignty as one normative foundation of the international society of states. Although the structure of the international society is anarchy,

meaning that no supranational authority is above individual states, the Westphalian norm ensures that states respect each other's sovereignty and regulates the relations among states (Bull 1977).

Nevertheless, Westphalian sovereignty is not the only norm governing the relations among states. Many advocates of "new sovereignty" have proposed alternative organizing rules of sovereign control rights. For example, in his book *Hierarchy in International Relations*, David Lake (2009) challenges the anarchic nature and the absolutist Westphalian norm of the international system, arguing that a variety of sovereignty arrangements and hierarchical relations exist among states. Sovereign authority is constantly negotiated between dominant and subordinate states; the latter type often voluntarily compromises its sovereignty and transfers a portion of control rights to a dominant state in exchange for other more valuable goods (Lake 2009).

Other scholars try to categorize the normative dimension of sovereignty. Each type of sovereignty is a distinctive set of rules governing how sovereign control rights should be organized and function. For example, Sorensen proposes three types of "sovereignty games": Westphalian, post-colonial, and postmodern. The post-colonial sovereignty game captures the dependency relationship between developed states and their former colonies, and the postmodern game is reflected by the EU model of limiting state's autonomy and delegating authority to a supranational entity (Sorensen 1999). Keohane classifies sovereignty into two categories: the classic conception of external sovereignty, and pooled sovereignty. The former refers to the traditional Westphalian norm; the latter is also generated from EU practices and resembles Sorenson's post-colonial sovereignty game that transcends the Westphalian system of nation states (Keohane 2002).

Among the three dimensions of sovereignty, what has undergone changes is the normative

meaning. Most discussions about the malleability of sovereignty in the “new sovereignty” literature actually target the Westphalian norm or absolutist sovereignty. The norm has frequently been violated by states in practice; a variety of alternative norms, such as human rights and economic globalization, imply different organizing rules and principles of sovereign control rights. However, it would be hasty to conclude that the international order based on the Westphalian norm has been profoundly transformed, replaced by a new set of organizing rules.

In fact, alternative organizing rules of control rights proposed by scholars can be viewed as different degrees of internalization and practice of the Westphalian norm, rather than completely distinct sovereignty norms. Although the prototype of Westphalian sovereignty is a state with absolute autonomy and exclusive control rights within its territory, the norm should not be rigidly interpreted in an absolutist sense, but viewed as a resilient institution that allows and absorbs certain degrees of nonconformity. The degrees to which states internalize and practice Westphalian sovereignty can be arranged in a continuum. At one end, states fully internalize and comply with the absolutist sovereignty; while at the other, the Westphalian norm has no effect on states’ beliefs and practices at all. In reality, the strength of the sovereignty norm of the international society in different time periods falls in between the two extreme ends of the continuum. Although material incentives, strategic calculation, and a series of boundary-trespassing norms have indeed weakened the strength of the Westphalian norm, neither pure instrumental calculation nor alternative norms can completely invalidate its constitutive and regulative roles in today’s world. In order to better comprehend the degrees of changes and continuities of state sovereignty, we must understand the sovereignty costs for states to cede control rights and deviate from the Westphalian norm.

2. Sovereignty Costs

Voluntarily transferring control rights and decision-making autonomy to other parties will have negative impacts on the authority and normative dimensions of state sovereignty, but will not hurt states' legal standing of statehood. International legal sovereignty does not prevent states from delegating authority, but the Westphalian norm does. Therefore, states giving up their decision-making autonomy have to bear the costs of losing substantive control rights as well as the costs of deviating from the sovereignty norm.

2.1 Constructing the Concept of Sovereignty Costs

I define sovereignty costs as the costs of ceding sovereign control rights and policy autonomy to other parties. The costs can be broken down into two parts: *substantive* or *inherent* values of the control rights being ceded, and additional “normative *premiums*” due to states' deviation from the Westphalian norm. Sovereignty costs can be denoted by the equation of “ $S=C+W$,” where “S” represents the overall sovereignty costs, “C” the substantive values of the control rights, and “W” the normative premiums. The relations between different dimensions of sovereignty and the components of sovereignty costs are illustrated in Table 1.1.

Table 1.1: Three Dimensions of Sovereignty and Sovereignty Costs

Three Dimensions of Sovereignty	Negative Impacts of Ceding Control Rights on Each Dimension	Sovereignty Costs, $S=C+W$
Legal Standing	None	Zero
Control Rights	Diminishing authority and constraining autonomy	C =inherent values of control rights being ceded
Westphalian Norm	Violating the norm	W =normative premiums of deviating from the norm

We can use property rights as a metaphor to facilitate our understanding of sovereignty costs. Within the institution of property rights, once the ownership of a certain property is clear to all parties, a transaction can take place. There is no norm prescribing that property rights are inherently indivisible, to impose additional normative premiums on the economic transaction. The owner can sell, lease, and transfer the usage rights or control rights of its property for profits. As for state sovereignty, the legal standing of statehood set up the “ownership” of sovereign control rights for individual states. Without any norm preventing states from trading those rights freely, the authority dimension of sovereignty can be viewed as an institution functioning less as “a territorially defined barrier than a bargaining resource,” as Keohane puts it (2002: 748). And the substantive cost “C” captures the “*inherent*” values of the control rights realized in an ideal setting of free market transaction without being influenced by any normative factors.¹

However, sovereignty has more normative meaning than does property rights. Because of the existence of the established Westphalian norm, state sovereignty has been constructed as indivisible and invaluable in theory. Once the norm is internalized by states, it interacts with and reinforces the domestic ideology of nationalism, becoming a source of domestic legitimacy for regimes or political leaders. Discrepancies between beliefs and practices—even voluntarily ceding control rights to other parties—will cause cognitive dissonance and domestic social pressures. The normative premiums variable (W) captures both the psychological and social costs of deviating from the Westphalian sovereignty. As the normative premiums originate from unit-level beliefs in the Westphalian norm, the more strongly states internalize the norm, the

¹ The term “inherent” does not mean that the values of control rights are uncontested or fixed, but rather that the values originate from “control rights”—from the authority dimension of sovereignty, not from the Westphalian norm. Another intuitive way to envision the two parts of sovereignty costs is to use a concrete commodity, such as a luxury car, as a metaphor: the costs of a car can be divided into the “inherent value” of the car and the premium of its brand name. A car as a substantive thing has inherent value, even without a brand, because the car can perform certain functions and costs labor, materials, and time to build. The substantive value of sovereign control rights (C) is like

higher the value they assign to their sovereign control rights and thus the higher the normative premium (W) for states to deviate from their beliefs.²

My conceptualization of sovereignty costs is a refinement of the concept used by rational choice literature on the delegation of authority to international institutions. I substantiate the rationalist definition with normative meanings. In the delegation literature, the concept has been widely used to refer to “the costs that a state incurs by delegating a function ordinarily performed domestically to an international institution over which it has little, if any, control” (Simmons and Danner 2010: 235). For example, Abbott and Snidal argue that sovereignty costs “can range from simple differences in outcome on particular issues, to loss of authority over decision making in an issue-area, to more fundamental encroachments on state sovereignty” (2000: 436). In their study of the diffusion of the BITs, Elkins, Guzman, and Simmons define the concept as “the costs any government pays when it negotiates, ratifies, and complies with an investment treaty,” which includes the political costs of assembling a coalition and the costs associated with giving up a broad range of policy instruments (2006: 825). In more recent research on the ratification of the Rome Statute of the ICC, Simmons and Danner simply define sovereignty costs as “the costs of giving up decision-making autonomy” (2010: 233).

Those definitions and the usage of the concept in the delegation literature are rather ad hoc. Most studies do not care about the meanings of sovereignty, nor do they differentiate the variation of sovereignty costs caused by different types of control rights being transferred. Sovereignty cost is conveniently constructed as an all-encompassing concept consisting of all

the inherent value of the car; while the normative premium of sovereignty costs is like the premium of its brand name.

² States that intrude or trespass upon other countries’ sovereignty by coercive means will incur international social pressures. However, the social costs imposed by the international society for violating other states’ sovereignty are not the sovereignty costs defined in this dissertation. This study focuses on the sovereignty costs of voluntarily ceding control rights. In fact, the international society rarely punishes or exerts pressure on states that voluntarily transfer their own sovereignty to other parties.

kinds of costs associated with delegation. Moreover, the sovereignty costs of delegating authority to supranational bodies are assumed to be very high and thus can play a function of tying hands and demonstrating “credible commitment” (Elkins et al. 2006; Simmons and Danner 2010). However, few studies have paid attention to why sovereignty costs are necessarily high for states that delegate authority, why the costs that states may choose to bear in exchange for expected gains can be perceived by others as high and credible enough, and why the costs of delegation may be reasonable for some states, but prohibitively high for others.

Nevertheless, the rationalist definition serves as a good starting point. Although few studies have discussed what sovereignty really is, their conceptualization of sovereignty costs implies that the “function,” “policy instruments,” “decision-making autonomy,” and “authority” being transferred to international institutions are associated with the sovereign control rights legally possessed by states. As those sovereign rights have inherent value, delegation imposes costs on states. Moreover, the rationalist definition implies that sovereignty costs are essentially material, as if the costs are “objective” market values that can be realized in a market transaction in exchange for equal or higher material benefits.

What rationalists miss is the role that the Westphalian norm plays in “asset valuation.” In fact, without a shared common norm that sovereignty is invaluable and indivisible, states would not necessarily view the action of delegating control rights as costly and credible. Delegating authority to international institutions violates Westphalian sovereignty and is especially costly for states that believe in the norm and constantly emphasize it to both domestic and international audiences. Therefore, sovereignty costs of losing control rights should consist of both the inherent values of the control rights being ceded and the normative premiums of deviating from the Westphalian norm.

2.2 Sovereignty Costs and the “New Sovereignty” Literature

Ironically, although the concept of sovereignty costs has been taken for granted in the delegation literature, scholars of sovereignty have rarely used the concept in their work. By applying the equation of sovereignty costs, that is, $S=C+W$, to reexamine the “new sovereignty” literature, one can better understand the merits and limitations of both the rational choice and the constructivist approaches to state sovereignty. “ $S=C$ ” reflects the rationalist interpretation. If the Westphalian norm does not exist or states do not believe in the norm at all, the normative premiums (W) are equal to zero and sovereignty costs are fully determined by the value of the control rights being ceded. In that sense, sovereignty does not differ much from property rights and can be divided and traded freely in the international political market.

Some rationalists do not treat sovereignty as a norm, but simply as control rights. A representative work is Cooley and Spruyt’s *Contracting State* (2009). The authors define state sovereignty as “a bundle of rights and obligations that are dynamically exchanged and transferred between states” (2009: 4). Drawing insights from incomplete contracting theory, they argue that sovereignty transfer often takes the form of incomplete contracting, which means that contracts do not anticipate all possible future contingencies or specify a full array of obligations for parties (2009: 9). For Cooley and Spruyt, sovereignty control rights are similar to certain specific assets or property rights and can naturally be transferred, bargained, and contracted. The transferability is an inherent attribute of sovereign rights, rather than a violation of norms. In that sense, trading control rights would not incur any additional normative premiums.

Other rationalists recognize the normative meaning of sovereignty, but they do not believe that norms play a major role in states’ decision making and foreign policy choices. For example, Krasner’s theory of sovereignty as organized hypocrisy maintains that the Westphalian norm is

frequently violated because states are free to pick and choose norms that are most suitable to their national interests (1999: 6). When the logic of consequence and the logic of appropriateness are in conflict, the former usually triumphs in the international arena. Nevertheless, Krasner recognizes that the legitimacy of the norm is rarely challenged by states' practices in reality, and that states always need to find ways to justify their deviations (2001: 1). In that sense, the sovereignty norm has at least some face value to states, and public violation of the norm will hurt the legitimacy of rulers. Therefore, the Westphalian norm does incur some costs on violators and the normative premiums (W) are slightly greater than 0.

However, in Krasner's later edited book, *Problematic Sovereignty*, contributor Michel Oksenberg implicitly challenges the instrumentalist view, though he accepts Krasner's organized hypocrisy as an overarching theoretical framework (2001). Oksenberg compares the differences in China's approaches toward Tibet and Taiwan before and after China entered into the Westphalian system. His study demonstrates that the existence of the Westphalian norm has greatly constrained China's policy choices, and that many flexible and ambiguous historical approaches towards the two areas are now unacceptable and illegitimate (2001: 87). Viewing the sovereignty norm as having both constitutive and regulative functions is essentially different from an instrumentalist interpretation. The normative premiums (W) in Oksenberg's work would be much higher than Krasner's organized hypocrisy implies.

Constructivists generally agree that state sovereignty is a historical social construction and its meanings vary in different situations and historical stages (Biersteker and Weber 1996; Osiander 2001). Most would concur that normative premiums "W" is a variable and has value, because the Westphalian sovereignty has both constitutive and regulative effects on states. Yet, the Westphalian norm is not a timeless principle. The value of W was highest for states in

nineteenth century Europe, when the Westphalian sovereignty was the most important normative foundation of the international order. But the normative premiums have less value for many states today because a series of boundary-trespassing forces—such as economic globalization, the rise of human rights norms, and the growing influence of non-state actors in the international society—have weakened the role of the Westphalian norm in constituting and regulating interstate relations.

For some scholars—who believe that the Westphalian sovereignty is outdated and replaced by new norms and the world is moving toward a new era “beyond sovereignty”—the values of the normative premiums “W” would even approach zero in today’s world. For example, Chayes and Chayes’s “new sovereignty” argument maintains that because interdependence, characterized by an increasingly dense network of international institutions, has profoundly changed the nature of the international system, “sovereignty *no longer* consists in the *freedom* of states to act *independently*, in their perceived self-interest, but in *membership* in reasonably *good standing* in the regimes that make up the substance of international life”; “in today’s setting, *the only way most states* can realize and express their sovereignty is through participation in the various regimes” (1995: 28; italics mine).

Such an interpretation of sovereignty should be treated as one ideal type of new sovereignty, rather than an objective description of the reality. Although states’ practices today do exhibit some tendencies deviating from the absolutist Westphalian norm, it is unlikely that most states believe that membership in international organizations is *the only way* to realize their sovereignty, or that independence and autonomy are no longer the core values of sovereignty.³

³ The main theme of Chayes and Chayes’ work is states’ compliance with international treaties. As they believe that nowadays states value their membership in international institutions more than their policy autonomy and that the only way for states to realize their sovereignty is through participation in those regimes, they suggest the “managerial approach,” rather than coercive approaches, as the most effective way to deal with noncompliance.

In fact, the specific aspect of sovereignty reflecting in the membership of international institutions is the legal standing of statehood, not substantive sovereign control rights. Membership and good social standing are social benefits that differ in nature from sovereign control rights. In order to gain those social benefits, states still have to pay sovereignty costs by delegating and transferring control rights to international authorities. The substantive values of control rights being ceded and the normative premiums (W) of deviating from the Westphalian norm do not disappear simply because states gain benefits and find a new way to realize their legal sovereignty through participating in international institutions.

In contrast to the claims and arguments invalidating Westphalian sovereignty, many studies imply that although the impermeability of boundaries between states and the absolutist view of sovereignty have been subject to great challenges, sovereignty is still the pivot of the international society, and core values of the Westphalian norm still play an important role in defining the relationships among states (Thompson 1995; Carlson 2005). For example, Allen Carlson surveys several new trends in the evolution of sovereignty at the systemic level, examining the changes and continuities in China's practices of sovereignty along four domains of sovereign control rights. His study demonstrates that at the systemic and unit levels, changes are more likely to happen regarding sovereign authority and economic control rights; while in the territorial and jurisdictional dimensions, states' practices are still influenced more by the Westphalian sovereignty than by other boundary-trespassing norms (Carlson 2005). Thus the values of the normative premiums "W" would vary across different issue areas, but will approach neither zero nor infinity.

However, if their interpretation of state sovereignty is more like an ideal type than a faithful description of reality, the implications they draw from their assumptions—i.e., how to effectively manage noncompliance—may also have some limitations. In certain circumstances, managerial approaches may not be as effective as material rewards or sanctions in strengthening compliance.

Along the lines of examining inconsistencies between the Westphalian norm and state practices of sovereignty, Xu Xin's seminal work on China's policies towards Taiwan demonstrates that if the practices of managing and disguising discrepancies between norm and reality are institutionalized, a set of sub-norms of correct practices, that is, *orthopraxy*, will be generated. Xu cites James Watson, arguing that "orthopraxy (correct practice) reigned over orthodoxy (correct belief) as the principle means of attaining and maintaining cultural unity" in China (Xu, X. 2012: 72; Watson 1993: 84). For example, although the Chinese government cannot make any substantial moves toward bringing Taiwan back, over more than six decades it has strived for "sole legal representation" and constructed de jure one China as an orthopraxy to manage the inconsistency between the ideal of reunification and the unpleasant reality of the separation between the mainland and Taiwan (Xu, X. 2012: 73-78). Xu's study indicates that although maintaining this orthopraxy is very costly for China, the normative premiums (W) of doing nothing to allow the discrepancy to become salient are even higher.

Although most constructivists pay more attention to the normative connotation of sovereignty than do rationalists, they are less concerned about state sovereignty as a bundle of control rights that have substantive values for states. One drawback of the constructivist approach is that emphasizing mainly the social constructive and intersubjective nature of sovereignty implies that sovereign control rights do not have inherent value, and assumes that how states value their rights and autonomy is solely determined by the strength of the Westphalian norm. In that sense, the equation of sovereignty costs, " $S=C+W$," would be reduced to " $S=W$ " for many constructivists.

Defining sovereignty costs as consisting of both the substantive value of the control rights being ceded and the normative premiums incurred by the deviation from the Westphalian norm

better reflects the nature of state sovereignty than either rationalist or constructivist approaches alone. On the one hand, sovereignty costs capture the transferability and divisibility of sovereign control rights. As long as the sovereignty loss can be offset by potential gains, states will trade their control rights to achieve other, more valuable goals. On the other hand, the concept indicates that states will not easily trade their sovereign rights for any kind of gains or give up the rights unlimitedly without enough compensation. The higher the inherent values of control rights and the stronger states' Westphalian beliefs, the greater the sovereignty costs, and thus the more valuable the expected returns.

3. Sovereignty Costs and Core and Non-Core Sovereignty

The values of both components of sovereignty costs vary across issue areas. The inherent values of control rights are positively associated with the relative weights of different types of control rights to states' physical security; and the values of normative premiums are determined by the relative strengths of states' sovereignty beliefs in different issue areas. In general, the sovereign costs of core sovereignty—jurisdictional and territorial control rights—are higher than those of non-core sovereignty—sovereign authority and economic control rights. Therefore, states are more likely to make concessions and delegate the resolution of disputes in non-core than in core issue areas.

3.1 Categorization of Sovereign Control Rights

In order to understand the relative values of the sovereignty costs of different types of control rights, it is important to examine the rights-dimension of state sovereignty. Allen Carlson has built the most authoritative categorization of sovereign rights and authority. According to Carlson, sovereignty contains four relatively distinct bundles of rights: “each state's sovereign rights encompass exclusive possession of a specified territory, jurisdiction over a defined

population, political authority to govern within its own domain without foreign interference, and the ability to regulate economic activity within its territorial boundaries” (2005: 11). In short, the four nodes of rights can be called territorial sovereignty, jurisdictional sovereignty, sovereign authority, and economic control rights.

Carlson’s theory of sovereignty treats the four types of control rights as equally important and meaningful to any individual state. Yet, his empirical study on China demonstrates that China does not always attach the same importance to all four dimensions. Before the late 1970s, China held an almost absolutist view of state sovereignty in all issue areas. Its approaches to state sovereignty have gradually changed regarding economic rights and sovereign authority, but remained resistant to boundary-trespassing forces in territorial and jurisdictional sovereignty since the 1990s (Carlson 2005). For Carlson, whether China can change its discourses and behaviors in a specific issue area is contingent upon the changing balance of a set of boundary-trespassing and reinforcing forces (Carlson 2005: 11).⁴ Nevertheless, the type of control rights itself is not an explanatory variable in Carlson’s account, as he does not examine to what extent the changes and continuities of China’s practices, as well as the relative weights of different forces, are determined by the nature of different types of control rights.

Another way to categorize sovereign control rights is proposed by Chinese IR scholar Wang Yizhou. In a series of studies on state sovereignty, he maintains that the connotations of state sovereignty can be differentiated into different “levels.” “Core sovereignty” (*hexin zhuquan*) concerns the most sensitive and fundamental national security and cannot be compromised even slightly; while “ordinary sovereignty” (*yiban zhuquan*) has certain degrees of flexibility and can be conceded on some occasions, but can also be taken back when necessary (Wang 2000a: 8;

2000b: 10-11). Wang's categorization indicates that not every level of sovereignty is equally important, and that the degree to which states can compromise their sovereignty is determined by the nature of different types of control rights. Although Wang's argument is intuitive, he does not elaborate on how the two categories of sovereignty can be applied in examining important theoretical questions regarding state sovereignty, nor does he provide enough empirical evidence to support the validity of his categorization.

Carlson's and Wang's categorizations can be combined to examine the relative weights of different types of control rights. One can use Wang's labels to classify the four types of sovereign rights defined by Carlson into core and non-core sovereignty for each state. Among the two components of sovereignty costs, the normative premiums (W), which reflect the strength of states' beliefs in the Westphalian norm, determine the relative values of the overall sovereignty costs (S) of different types of rights. If states hold an absolutist view of sovereignty regarding a certain type of rights, they will perceive the control rights as indivisible and the normative premiums of even a small amount of the rights as close to infinity. In contrast, if states do not believe in the Westphalian norm at all, normative premiums (W) will equal zero, and the values of sovereignty costs (S) will be determined solely by the inherent value of control rights (C).

The inherent values of control rights (C) are determined by the relative importance of certain types of rights to a state's physical security. Realists assume state survival to be the most important national interest (Waltz 1979). For them, sovereign rights in high politics are inherently more valuable than control rights in low politics issue areas, as the former are more important to state survival than the latter. Among different types of control rights, jurisdictional

⁴ Those forces include "relatively persistent and historically conditioned sovereignty-centric values, rational cost-benefit calculations, and external pressures (both material and normative) inadvertently brought to bear on China by

and territorial sovereignty as well as sovereign authority regarding regime and national security are high politics; while economic control rights and political authority over social, environmental, and other technical issues are low politics. The inherent value of control rights (C) is one major factor that influences the strength of states' sovereignty beliefs. *Everything else being equal*, the higher the inherent values of control rights C, the higher the values of normative premiums W; in that case, the normative premiums W and overall sovereignty costs S in high politics issue areas are generally higher than those in low politics areas.

Yet, the categories of core and non-core sovereignty as well as the relative weights of different types of control rights are socially constructed, rather than fixed, because the relative strengths of states' Westphalian beliefs in various issue areas are not solely determined by the inherent values of control rights, but influenced by a variety of boundary-trespassing and reinforcing factors. Different states may have different understandings of what constitutes their core sovereignty; and the relative weights of different types of control rights may vary over time for a single state. Therefore, the distinction between core and non-core sovereignty does not necessarily overlap with the realist differentiation between high and low politics.

Although for individual states, certain types of core sovereignty may become non-core over time and vice versa, for most states and at most times, as Table 1.2 shows, jurisdictional and territorial sovereignty can be categorized as core sovereignty, because both the inherent values and the normative premiums of the two types of control rights are higher and more stable than those of sovereign authority and economic control rights. Jurisdictional sovereignty can be viewed as one special type of territorial control rights, as it contains not only the control rights over land or sea, but also over the population residing within the territory (Carlson 2005: 16). Taylor Fravel defines the former as "sovereignty over homeland areas" and distinguishes

“homeland disputes” from territorial disputes over “frontier areas” (2008: 220). Both the inherent values “C” and normative premiums “W” of jurisdictional sovereignty are higher than those of ordinary territories, because “[t]erritorial sovereignty *sometimes* involves questions of national unity, jurisdictional sovereignty is always about this potentially explosive concern” (Carlson 2005: 16; italics in original). Scholars often interpret territoriality, that is, both jurisdictional and territorial sovereignty, as the very core value of the Westphalian norm and as defining state’s national identity. As John Ruggie argues, “disjoint, mutually exclusive, and fixed territoriality most distinctively defines modernity in international politics” (1993: 174). In contrast, both sovereign authority and economic control rights are less likely to be viewed as indivisible, and their normative premiums are less likely to approach infinity.

The distinction between core and non-core sovereign control rights, once established, can become a reified social fact. Core sovereignty constitutes vital national interests and the national identity of states; it is an important source of a ruler’s and a regime’s legitimacy at home. If a ruler or regime is perceived by the public as incapable of defending a state’s core national interests, its domestic legitimacy will be strongly challenged. Yet, non-core sovereign rights are more instrumental and functional; the diminishing of state sovereignty in those issue areas is less likely to invoke strong emotional and nationalist feelings, and thus less likely to threaten the domestic legitimacy of a ruler or regime. As ceding control rights of core sovereignty will impose much higher sovereignty costs than for non-core sovereignty, boundary-trespassing changes at both systemic and unit-levels are less likely to happen in the former than in the latter issue areas.

Table 1.2: Core and Non-Core Sovereignty

Types of Control Rights		Vital for State's Physical Security	Inherent Values of Control Rights, C	Belief in the Westphalian Norm	Normative Premiums, W	Sovereignty Costs, $S=C+W$
Core	Jurisdictional and territorial	Yes	High	Strong	High	High
Non-Core	Sovereign authority and economic	No	Low	Weak	Low	Low

Allen Carlson's survey of Chinese elites' discourses and China's approaches towards sovereignty shows that China held an almost absolutist view of state sovereignty in all four domains of control rights at the beginning of its economic reform. Such a stance in every issue area had softened slightly in the 1980s. However, since the 1990s, changes conforming to boundary-trespassing norms have mainly emerged in the dimension of sovereign authority and economic control rights, while boundary-reinforcing practices have dominated territorial and jurisdictional issue areas (Carlson 2005). These findings indicate that the distinction between core and non-core sovereignty did not exist in Mao's era; or, put in another way, all types of control rights were equally important and their normative premiums (W) all extremely high.

Carlson's interpretation is correct in the sense that China's belief in sovereignty was very strong regarding all types of control rights before the 1980s, and that obvious distinctions have gradually emerged only since the start of its economic reform. Nevertheless, more subtle differences in the relative weights between core and non-core sovereignty existed even in Mao's China. Two important practices in Mao's era revealed such differences: one is the Five Principles of Peaceful Coexistence promoted by China as the most fundamental norm of an ideal international order, and the other is the policy embryo of the "One Country, Two System"

principle proposed by Mao and his colleagues in solving the Taiwan issue.

The *order* of the Five Principles clearly shows the different weights the Chinese government has attached to different types of sovereignty control rights since the very early period of the PRC. The official version of those principles states: “mutual respect for *sovereignty and territorial integrity*, mutual non-aggression, non-interference in each other’s internal affairs, equality and mutual benefit, and peaceful coexistence.” The main theme reflected in the Five Principles is state sovereignty. The first principle treats territoriality as a unique type of control rights and places it side by side with the general notion of sovereignty; this subtle differentiation means that territorial unification is so important that it deserves a separate category rather than being combined with other types of control rights and merged into the general concept of sovereignty. The second principle of non-aggression reemphasizes the importance of securing states’ territory and boundaries. The third one of non-interference corresponds to the issue areas of sovereign authority; the fourth one of equality and mutual benefit addresses economic control rights; and the fifth summarizes the general principle of peaceful coexistence among states.

Because Chinese government has considered the Five Principles as the most important normative foundation of the international order and has taken great effort to promote them in the international society, the order of different principles is not a random choice, but reflects how Chinese leaders perceive the relative importance of those control rights. The Five Principles were first raised by Premier Zhou Enlai in 1953, while meeting with an Indian delegation in Beijing. At that time, the first principle was expressed by Zhou as mutual respect for “*lingtu zhuquan*” (Zhou 1980: 118), which can have two types of interpretations in English: “*territorial sovereignty*,” or “*territory and sovereignty*.” Whichever translation better reflects Zhou’s and other Chinese leaders’ original thoughts, territory was clearly the most important type of

sovereignty and the top priority in Chinese leaders' minds at that time. The finalized official version modified Zhou's words into a less confusing expression with "*zhuquan yu lingtu wanzheng*," that is, "sovereignty and territorial integrity," putting general sovereignty ahead of the special types of jurisdictional and territorial control rights.

Another more practical example reflecting the relatively persistent distinctions between core and non-core sovereignty is the "One Country, Two Systems" (*yiguo liangzhi*) principle adopted by the Chinese government in solving "homeland disputes" regarding Taiwan, Hong Kong, and Macao. Some Western scholars treat China's approach to Hong Kong and Macao as a deviation or violation of the Westphalian norm (for example, Krasner 1999). On the contrary, the principle indicates that China has prioritized jurisdictional and territorial sovereignty over sovereign authority and economic control rights; the former are less compromisable, while the latter can be handled with a great deal of flexibility. If Taiwan, Hong Kong, and Macao return to the mainland, they become parts of a unified China and the Chinese government will achieve the most important aim of defending its core sovereignty; therefore, allowing those special regions to maintain great autonomy in non-core sovereign issue areas is compatible with China's core interests and national identity.

Nowadays, the *yiguo liangzhi* principle has become widely known as Deng Xiaoping's innovation, with the goal of peacefully achieving national reunification. Yet the origin of this policy can actually be traced to Mao's time. When meeting with Indonesian President Sugano in 1961, Mao Zedong told Sugano that "if Taiwan is not a state, has no central government, and return to the motherland, Taiwan's social system (*shehui zhidu*) can be discussed in the future. We will allow Taiwan to maintain its current social system and wait for the Taiwanese people themselves to solve the problem" (Mao 1994: 469). Mao's words indicated that as long as the

Chinese government maintained the jurisdictional sovereignty over Taiwan, it could cede non-core sovereignty authority and economic control rights to the Taiwan. Zhou Enlai later extended Mao's ideas into the proposal of "One Principle, Four Specificities" (*yigang simu*), whose main theme states that Taiwan must return to the motherland; and except for foreign affairs, Taiwan can maintain great autonomy in all other issue areas. Those proposals were the earliest embryos of Deng's "One Country, Two Systems" and demonstrated that Chinese leaders had long differentiated the relative weights of different types of sovereignty when considering solutions for homeland disputes.

Some scholars even trace the origins of *yiguo liangzhi* back to China's historical statecraft of managing the relationship between the central kingdom and periphery areas. Chinese legal scholar Qiang Shigong argues that China's historical approaches in governing frontier areas can be characterized as "one country, multiple system" (*yiguo duozhi*), which means indirect control through a variety of feudal institutions. Qiang sees Deng's approach as highly consistent with traditional Chinese statecraft (2010: 220-221). Xu Xin further confirms Qiang's observation by arguing that the Chinese Communist Party has inherited and reinforced the "rule of thumb" of the Sinic tradition for maintaining the unity of the Kingdom—"to ensure local allegiance by accommodating the local reality, whatever it may be" (Xu, X. 2012: 81).

Both Qiang and Xu treat the practice of "One Country, Two Systems" as closer to Chinese tradition than to the Westphalian norm. Yet, in terms of national and territorial unification, the Sinic ideal of "*tianxia yitong*" (unity of all under heaven) and the Westphalian norm of territoriality should be viewed as reinforcing rather than contradicting each other. Although China's historical encounter with the West resulted in the collapse of the Sinic world order, what the Westphalian sovereignty overturned was the hierarchical suzerain-tribute relationship

between China and its neighboring states, rather than the core value of “unity” of the Sinic ideal. When China entered into the modern world of nation states and accepted Westphalian sovereignty as the fundamental norm governing inter-state relations, the ancient ideal of “*unity* of all under heaven” without clear national boundaries was transformed into a new national goal of “territorial and national *unification*” within fixed borders.

Core sovereignty of jurisdictional and territorial control rights does not only constitute China’s new national identity in modern times, but also resonates with China’s glorious history and its civilizational identity in the past. As Xu Xin points out, sustaining and reviving Chinese civilization in modern times “entails the imperative of Chinese nationalism that strives for China’s survival and unity as a sovereign nation state in the international system, through the transformation of Chinese civilization itself” (Xu, X. 2012: 65). Core sovereignty is the reification of a confluence of Chinese civilizational and national identities. Defending China’s national and territorial unity is one important source of the legitimacy of the ruling party and the political regime. Therefore, compromising core sovereign rights imposes much higher sovereignty costs and is less likely to happen than ceding non-core rights in Chinese foreign policy practices.

3.2 Core Sovereignty and China’s Reservations towards Delegation

The implication of the categorization of core and non-core sovereignty for China’s approaches toward legalized international treaties is that China will delegate disputes only in non-core issue areas, where sovereignty costs are relatively low, but not in core issue areas, where sovereignty costs are very high. For China to accept a treaty with mandatory DSM, it must be able to make use of exclusion clauses and reservations to minimize sovereignty costs and exclude its core sovereignty from the treaty’s jurisdiction.

Core sovereignty is the most important criterion for China to evaluate the legitimacy of a treaty. In another words, China will not accept a treaty as legitimate if some of its provisions may have negative impacts on China’s jurisdictional and territorial control rights. When China negotiates international treaties, getting looser treaty obligations, such as exclusion clauses and permission for reservations, to minimize sovereignty costs has often been an aim no less important than ensuring maximum gains. Chinese decision makers have never agreed to delegate authority with high political stakes regarding national and territorial unification in international treaties, because they cannot afford to lose such cases in international legal decisions. Chinese leaders’ preference order over different dimensions of state sovereignty has been clearly demonstrated by China’s reservations towards the UNCLOS and the BITs as well as its rejection of the Rome Statute of the ICC, as Table 1.3 shows.

Table 1.3: Core and Non-Core Sovereignty and China’s Approaches to Delegation

Types of Control Rights	Sovereignty Costs	Delegation	Cases
Core Sovereignty	Higher	No Delegation	ICC; UNCLOS—using the exclusion clause to opt out territorial and military disputes
Non-Core Sovereignty	Lower	Delegation	BITs, UNCLOS—issues not covered by the exclusion clause

The exclusion clause of the UNCLOS is one major mechanism ensuring the treaty’s widespread support at the global level, stipulating that disputes relating to sea boundary delimitations, sovereignty rights over continental or insular land territory, military activities, and issues in which the UN Security Council is taking action can be excluded from the compulsory DSM (UNCLOS 1982: 136-137). Because territorial disputes are often the most sensitive issues

with the highest political stakes, many states reject using international legal authorities to solve such conflicts, especially when contested areas have high economic and geopolitical value. This clause eliminates the biggest obstacle for China's ratification, and it ultimately excluded all eligible types of disputes. In addition, it made a reservation regarding the issue of innocent passage upon ratification. Although the UNCLOS posits that any ship should enjoy the right of innocent passage in the territorial sea of a coastal state, China's reservation requires foreign warships to obtain advance approval from or give prior notification to the Chinese government in order to pass through its territorial sea.

In a situation of bilateral negotiation, China has more bargaining power to shape the outcome in its favor. China has been able to negotiate looser terms with developed states to maintain more policy autonomy in the new BITs. In order to lower the sovereignty costs of delegation, China has incorporated a "standstill" clause in each treaty protocol, stipulating that any preexisting discrepancies between China's practices and the national treatment clause should not be interpreted as noncompliance. The clause promises that China will not intensify the current discrepancies and will make efforts to eliminate them over time. Moreover, China requires foreign investors from developed countries to spend three extra months on a domestic administrative review before resorting to international arbitration for dispute resolution in each Protocol. These requirements enable China to maintain as much political discretion and economic control rights as possible and to avoid unnecessary international arbitrations.

Compared with the BITs and the UNCLOS, the Rome Statute of the ICC incurs the highest sovereignty costs for China. It gives teeth to international human rights and humanitarian law, setting up a permanent court to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression. Moreover, the Prosecutor of the ICC may open an

investigation not only when a situation is referred to him/her by a state party or by the UN Security Council, but also when the Pre-Trial Chamber so authorizes him/her based on information received from other sources, such as individuals or NGOs. Those treaty provisions may have potentially negative impacts on China's core sovereignty. If the government does suppress secession movements in Tibet and Xinjiang or use military force to reunite Taiwan in some extreme situations, then overseas Tibetan and Uighur diasporas, Chinese political dissidents, and human rights NGOs can bring cases against Chinese leaders and government officials to the ICC. Moreover, accepting the Rome Statute may embolden some ethnic minorities to pursue secessionist goals and weaken the effectiveness of China's deterrence strategy against Taiwan's independence. Given that the Rome Statute of the ICC does not allow any reservations to compromise the integrity of the treaty, China cannot exclude its core sovereign rights from the Court's jurisdiction. Therefore, China eventually voted against the Rome Statute, even though such an action made it a small minority on the ICC issue.

4. Sovereignty Costs and Boundary-Trespassing Behaviors of States

Sovereignty costs is a unit-level concept and captures the costs of losing sovereign rights as perceived by individual states. Applying the concept can facilitate our understanding of the *nature* of both *changes* and *continuities* in individual states' approaches to sovereignty. In particular, why would states cede control rights to other parties in certain issue areas? And how are the *limits* of boundary-trespassing practices determined? From the sovereignty costs perspective, states will cede more control rights over time either when the material benefits of doing so increase and can *offset* the overall sovereignty costs (S), or when the normative premiums (W) of sovereignty costs *decrease* due to the weakening of the sovereignty belief by boundary-trespassing forces. The former is a static benefit-cost calculation, as states' interests

and beliefs are fixed. Utility-maximizing behaviors in the short term do not alter states' beliefs, and thus have no impact on the values of the normative premiums (W). In contrast, a decrease in the normative premiums of sovereignty costs is associated with dynamic processes of belief change and preference formation. States' sovereignty beliefs can be weakened when they recognize either the *social* or the *normative legitimacy* of a boundary-trespassing treaty, institution, norm, trend, or the international order in socialization process, and believe that a certain amount of sovereign control rights *ought to* be transferred to other parties.

Social legitimacy and normative legitimacy are two ideal-types associated with a socialization process. The former is associated with a process of weak socialization and can only *incrementally* lower the normative premiums of sovereignty costs; at this stage, although states have formed social-oriented interests, such as maintaining a good social image and pursuing high social status, material self-interests and the sovereignty norm may still play more important roles in determining their policies and behaviors. Weak socialization can happen in a top-down manner, when political elites, especially political leaders and government officials, accept the social legitimacy of an institution or a norm by recognizing that a widely supported institution or norm can take effects in shaping the international order or represent an inevitable historical trend of the international society. In contrast, normative legitimacy reflects strong socialization effects and the *internalization* of alternative boundary-trespassing norms, and can lower the normative premiums to the utmost degree. The existence of a strong domestic civil society or transnational social networks is usually a precondition for strong socialization. When domestic and transnational social actors can effectively organize and promote alternative boundary-trespassing norms, they can exert social pressures on policymakers, transfer their own preferences into national policies, and accelerate the bottom-up socialization process. At this stage, the newly

internalized norm, rather than material factors and the Westphalian sovereignty, play a more important role in constituting states' interests and identities. Nowadays, material interests and social legitimacy characterize the changes of China's policies on legalization in non-core issue areas, while Western European countries are the prototype states of normative legitimacy. The following sub-sections will discuss the three mechanisms of change and their implications on China's policies in detail.

4.1 Material Incentives and Self-interests of States

One major reason that states accept constraints on their autonomy and cede control rights to other parties is to gain tangible material benefits, which can partially offset the rise in sovereignty costs. Material interests of survival, security, and prosperity are the most important self-interests of states. Rational choice approaches often assume that actors are egoistic in nature and that self-interests are the fundamental motives of most social actions (Chong 1995; Green and Shapiro 1994; Ferejohn and Satz 1995). This subsection draws implications from rationalist literature, focusing on how material interests and self-oriented characteristics of states contribute to boundary-trespassing behaviors. Yet, material or self-interests are not the sole interests, but an important subset of states' interests. The former mainly reflects egoistic attitudes of the self towards others and rules; while interests in general are more diverse and can also have social and non-egoistic connotations (Wendt 1999; Hurd 2007: 38)

State sovereignty has both material/egoistic and ideational/social connotations. Sovereign control rights and authority are historically and socially constructed; but the subjects of the control rights are material, such as territory, population, and all kinds of economic and political activities. On the one hand, the Westphalian norm strengthens the individualist and self-oriented characters of states, as it emphasizes state autonomy and the exclusive nature of control rights

within states' territory. On the other hand, as one type of social norms regulating inter-state relations in the international society, it requires reciprocity and mutual respect for sovereignty among state actors.

States with self-oriented preferences are utility-maximizers: they participate in international organizations and follow rules as the result of an instrumental calculation of net material benefits. When states face enough material incentives for deviating from the Westphalian norm, they will act accordingly. Interactions among states can be viewed as transactions regulated by contracts. States choose to delegate certain degrees of sovereign control rights to international authorities, as international institutions, rules, and norms facilitate cooperation, enhance states' self-interests, and have functional value for them. Some states may also elect to submit sovereign autonomy to another state and enter into a stable hierarchical relationship, if the dominant state or a hegemon can provide valuable goods such as security, prosperity, and social order, in the long run.

Keohane's early work *After Hegemony* argues that self-interested states have incentives to participate in and uphold international institutions, because international regimes can help them to overcome market failure and collective action problems. As Keohane argues, egoistic states "can rationally seek to form international regimes on the basis of shared interest" (1988: 107). By providing information, reducing transaction costs, monitoring compliance, creating issue linkages, and preventing cheating and free-riding behaviors, international institutions can "render it possible for governments to enter into mutually beneficial agreements with one another" (1988: 13). Keohane's work indicates that as long as the material benefits of cooperation can outweigh the overall costs—including sovereignty costs—states will be willing to accept institutional constraints on their autonomy and maintain the function of international regimes.

In the past decade, rationalist studies on legalization and delegation have further extended the above theme in highly institutionalized settings. Researchers try to explain why states sometimes choose to cede a substantial amount of control rights to international authorities, signing legalized treaties that incur high sovereignty costs (see, for example, Abbott and Snidal 2000; Elkins et al. 2006; Simmons and Danner 2010). Abbott and Snidal summarize the role of hard law as a tool of signaling credible commitment, reducing transaction costs, modifying political strategies, and handling incomplete contracting problems (2000). In that sense, high sovereignty costs themselves can serve specific functions and help states to achieve more important national goals. Yet, no matter how high the sovereignty costs, the potential benefits of hard law must be great enough to offset those costs. For example, developing countries are often eager to sign legalized BITs and allow private actors to resort to international arbitration for dispute resolution, because they intend to use binding agreements to signal their credible commitment to protecting foreign investment (Elkins et al. 2006). The high sovereignty costs of delegation can be offset by the more valuable material benefits of increasing foreign investment and rapid economic development.

For egoistic states, the “legitimacy” of international institutions or norms is measured solely by self-interests and has only instrumental meaning. Encroachment on states’ sovereignty is perceived as “legitimate” only when states believe that their overall material well-being can be enhanced by ceding a certain amount of control rights. David Lake’s book *Hierarchy in International Relations* applies social contract theory and characterizes legitimacy as “relational authority.” Lake maintains that legitimacy follows from an exchange or bargain between two states: “Relational authority is premised on an exchange between ruler and ruled, in which A provides a political order of value to B sufficient to offset the loss of freedom incurred in his

subordination to A, and B confers the right on A to exert the restraints on his behavior necessary to provide that order” (Lake 2009: 29).

The “relational authority” in Lake’s theory can be characterized as instrumental legitimacy, as the subordinate must benefit from the social order provided by the dominant state. A social contract can be self-enforcing if the political order is desired by the subordinate. Nevertheless, the ruled party always has incentives to demand more autonomy and expand its range of free choices; and a dominant state also has the tendency to abuse its authority and encroach too much on the sovereignty of the ruled (Lake 2009: 32). Therefore, “legitimate” order among self-interested actors reflects a dynamic equilibrium that is constantly bargained and negotiated among states.

In fact, instrumental legitimacy is a stretch of the concept of legitimacy, as legitimacy cannot be reduced to self-interests. As Ian Hurd defines, legitimacy is “an actor’s normative belief that a rule or institution ought to be obeyed” (2007: 7). Similarly, Buchanan and Keohane maintain that “an institution is legitimate in the normative sense is to assert that it has *the right to rule*” (2008: 25; italics in original). Once actors take an international order, norm, or institution for granted, their free agency decreases, and their interests take on more social and normative meanings other than material self-interests. If states are egoistic in nature, “legitimacy” is always instrumentally gauged by self-interests, and they will not accept the *social* and *normative legitimacy* of an international order, norm, or institution.

Therefore, as long as states cede control rights to other parties for material gains, their beliefs in the Westphalian norm do not change, nor do the values of normative premiums (W). Material benefits and instrumental legitimacy merely *offset*, but do not reduce the sovereignty costs of delegation. Nevertheless, the congruence of states’ material interests and boundary-

trespassing forces can facilitate socialization and increase the chance that states will accept the social and normative legitimacy of boundary-trespassing norms, institutions, and trends. In contrast, if states believe that their self-interests are harmed in the process, the chances that they will accept the legitimacy of boundary-trespassing forces will decrease, and strong socialization will be unlikely.

4.1.1 The Impacts of Material Interests on China's Approaches to Delegation

Increased material benefits are direct and root causes of China's shifts towards delegation over time in the UNCLOS and the BITs cases. The structural change in China's relative position in the international system has led to the expansion of China's self-interests, which could not be pursued when China was weak, but can now be enhanced by relevant treaty provisions. Increased material benefits can offset some portions of high sovereignty costs (S) of delegation, but cannot have direct impact on China's sovereignty belief and the normative premiums (W) of deviating from the Westphalian norm.

In the early decades of China's integration with the world, Chinese leaders had no confidence in China's ability to survive a new social environment. The external world was full of uncertainty; Chinese official discourses described international situations as "undergoing tremendous changes" or "experiencing a period of transition and turbulence" (Wang, J. 1994: 488). At that time, China took a gradualist, trial-and-error approach towards international institutions. Such an approach reveals the same pragmatic logic as China's domestic economic reform: China does not follow any canons or norms without first testing their effects against China's self-interests in practice. Samuel Kim characterizes the experimentalist approach as a "maxi-mini" strategy, as China often tries to maximize tangible material gains and selectively accept rules and regulations that are beneficial, but at the same time minimize the obligations and

costs of participation (Kim 1994: 419).

For example, when China was mainly a capital-importing state in the 1980s and early 1990s, it was reluctant to grant national treatment to foreign investors and to delegate all investment-related disputes to independent international arbitration. At that time, Chinese leaders believed that legalized BITs penetrated the sovereignty of host countries too much and served the interests of developed more than developing countries. Nevertheless, as China began to expand its overseas investments and became a major capital-exporting economy in the late 1990s, it intended to make use of hard BITs to protect its own investments in other countries. Since then, China has started to sign legalized BITs with both developing and developed countries, granting national treatment to private investors and delegating all investment-related disputes to autonomous international arbitration. All new BITs signed before 2009 have now been ratified and entered into force.

Similarly, China signed the UNCLOS in 1982 but did not ratify the Convention until 1996 because, when China was poor and weak, it was unwilling to bear distributive consequences and to accept treaty provisions that were beneficial to developed countries. This was particularly the case for the section on deep-seabed mining. When negotiating the Convention in the 1970s, China did not have enough material capability or advanced technologies to exploit deep seabed resources; it therefore advocated a more centralized seabed mining system to prevent developed countries from extracting resources freely. Yet, as China's economy continued to grow, along with its demands for natural resources, its interests became more aligned with developed countries, and its strategies toward deep-seabed mining changed in the late 1980s and early 1990s. China was then willing to accept a renegotiated section of seabed mining, which adopted a more market-based regime and accommodated even more the interests of developed countries.

Such changes paved the way for China to eventually ratify the UNCLOS in 1996.

Expanded self-interests due to China's rise allow China to reevaluate the benefits and costs of participating in legalized treaties and further deepening its integration with international regimes. Although increased material benefits can only partially offset the high sovereignty costs of delegation, the congruence between international institutions and China's rise boosts China's confidence in thriving in the established international order, facilitates its socialization into the international society, and increases the chance for it to accept the social legitimacy of boundary-trespassing norms and institutions.

4.2 Social Legitimacy and Weak Socialization

States' sovereignty beliefs can weaken and the normative premiums of sovereignty costs decrease when the degrees of their rationality and free agency shrink, and when the formation of national interests and the ways states pursue their aims are influenced by other states in the international society. Socialization is a mechanism for states to develop social-oriented interests and use socially accepted means to realize their self-interests. States may feel obliged to follow the majority of in-group members, because they are embedded in a social environment and willing to become social, rather than isolated. Social legitimacy and normative legitimacy are two ideal-types of legitimacy associated with two different socialization processes. This subsection focuses on the mechanism of social legitimacy and the associated weak socialization process, which does not require a fully internalization of the inherent meanings of a norm as normative legitimacy does.

Social legitimacy means that states feel that an institution has the right to rule and that a certain amount of control rights ought to be ceded, because they believe that an institution or norm has gained widespread support at the systemic level and thus has transformative or

inevitable impacts on the international order. In a weak socialization process, states may be agnostic or have only a shallow understanding of the normative meanings of a social trend, but nonetheless value their membership in the international society and wish to maintain a positive image in front of other states. Social incentives of good reputation or “backpacking” from other members and social pressures of shaming and blaming are considered as major micro-mechanisms for states to conform to social norms in this process (Finnemore and Sikkink 1998; Risse and Sikkink 1998; Johnston 2008). The effectiveness of *social* influence originates from the *social* nature of compliments and criticisms. States can easily ignore backpatting and shaming activities from a minority group, and will not change their behaviors and sovereignty beliefs unless an institution or a norm has gained enough social support to represent the “*majority will*” of the international society.

For states to believe in the social legitimacy of an institution or a norm, that institution or norm must gain or show potential to gain widespread support at the systemic level. Cass Sunstein uses “norm bandwagons” and “norm cascades” to describe a norm’s sweeping social power: “Norm bandwagons occur when the lowered cost of expressing new norms encourages *an ever-increasing number* of people to reject previously popular norms, to a ‘tipping point’ where it is adherence to the old norms that produces social disapproval”; and “norm cascades occur when societies experience *rapid shifts* toward new norms” (1996: 912; italics mine). Finnemore and Sikkink apply these concepts in explaining norm diffusion in the international setting, suggesting that tipping points and norm cascades rarely occur before one-third of states have adopted a norm (1998: 901).

The social legitimacy of a norm or institution does not lie merely in its social popularity, but also in its *power* in mobilizing the majority and its *effectiveness* in changing behaviors of most

states, especially great powers. As Ian Hurd maintains, an institution or norm with systemic legitimacy “affects the structure of the system overall by shaping the expectations for all actors about what constitutes a normal pattern of behavior” (Hurd 2007: 45). The power dimensional meanings of social legitimacy are reflected in states’ belief that the rise of a boundary-trespassing force is an *inevitable* trend and can have *transformative* impacts on the international order. Once states take for granted the change in their external social environment and certain degrees of encroachment on sovereignty,⁵ keeping up with the social trend becomes a desired aim. Even if states have to cede more control rights to international authorities and the substantive costs (C) of losing decision-making autonomy increase, the normative premiums (W) decrease as states accept the social legitimacy of boundary-trespassing forces, and they become eager to jump on the social bandwagon sooner rather than later.

Social legitimacy can weaken states’ sovereignty beliefs, lower the normative premiums (W) of sovereignty costs, and constitute or strengthen their society-oriented interests. States choose to trade reasonable portions of *non-core* sovereign rights for certain social goods, such as reputation, image, and status. Yet in the weak socialization process, fundamental self-interests such as survival and prosperity, as well as core sovereign control rights, still constitute states’ vital national interests. If a widely supported boundary-trespassing trend is perceived as being in conflict with states’ vital interests, states are unlikely to accept its legitimacy. Moreover, even if an institution or norm does not hurt states’ core sovereignty or fundamental self-interests, the *degree* to which states accept the social legitimacy of a boundary-trespassing trend is *conditional* on their intentions and capabilities of minimizing sovereignty costs. When states decide to jump

⁵ Rational institutionalists often argue that states maximize their utilities under *given* institutional constraints. It is exactly this taken-as-given nature that demonstrates the social legitimacy of an institution. At the strategic level, states maintain its rationality and perform a means-ends calculation; but the reason they take an institution for granted is that they *believe* in the inevitability of their external constraints that are socially constructed.

on a social or historical bandwagon, they may still have the tendency to maintain as much control rights and autonomy as possible, in order to minimize the costs of “the ride.” Therefore, social legitimacy in a weak socialization process can only *incrementally* lower the normative premiums of deviating from the Westphalian norm.

4.2.1 The Impacts of Social Legitimacy on China’s Approaches towards Delegation

Besides the newly evolved strategic interests of expanding overseas investments and securing access to natural resources, China’s decisions on ratifying legalized treaties are also driven by sweeping international social forces and China’s social interests of integrating with the international society. International law supported by the majority of states can change China’s external institutional and social environment, affect the international order, and alter China’s perception of the nature of the world. China’s acceptance of the social legitimacy of the economic globalization and the international maritime order complements the influence of increased material interests in China’s decision making on signing and renegotiating legalized BITs and ratifying the UNCLOS. These beliefs navigate China through uncertainties and incrementally lower the normative premiums of sovereignty costs.

In the BIT case, the decrease in the normative premiums of ceding economic control rights over time makes the overall sovereignty costs of legalized BITs more bearable in the late 1990s than before. The weakening of the Westphalian norm in economic issue areas is mainly due to the strengthening of a boundary-trespassing belief that economic globalization is an inevitable trend independent of men’s will, and that following the trend is a necessity rather than a choice. Chinese leaders do not derive the social legitimacy of globalization from the majority support of any specific economic treaty or organization, but from a series of sweeping and interrelated boundary-trespassing economic trends at the global level, such as the increasingly unified global

market, the liberalization of trade and investment, and the rise of transnational corporations in a global economy. Such a historicist belief has great social legitimacy in shaping decision makers' perceptions of the benefits and costs of participating in globalization and market competition, and thus leads to a comprehensive set of foreign economic policies to further internationalize and liberalize China's economy, including signing and renegotiating legalized BITs.

As for the UNCLOS, the timing of China's changed position was determined by the perceived widespread legitimacy of the treaty at the global level. When most countries were expected to ratify the treaty in the near future, and ever more countries began to make use of the treaty to claim sovereign rights over the seas, Chinese leaders began to believe that as "the constitution for the oceans," the UNCLOS had "taken effect" in shaping the new international maritime order of the twenty-first century; therefore, China could not stay out of the international mainstream. However, before confirming that the UNCLOS can truly represent the "majority will" of the international society, Chinese leaders took a wait-and-see stance in the 1980s and the early 1990s. Since developed countries are often the norm advocates and rule makers of the international society, if they do not ratify a treaty, China will not feel strong social pressures to participate. Moreover, developed countries also have strong material capabilities to go it alone; if a treaty cannot get their support, it cannot take effect in reality, and its legitimacy at the systemic level is compromised. Therefore, although Chinese elites supported the general principles of the UNCLOS and many developing countries had already become party members before the Convention entered into force, China did not ratify the treaty until it was clear that major Western countries would accede in the near future.

China's acceptance of the social legitimacy of economic globalization and the international maritime order plays supplementary roles to newly developed material interests in changing its

policies toward the BITs and the UNCLOS. Yet, because China is still in a weak socialization process, the social legitimacy of an international norm or trend can only incrementally weaken its sovereignty belief. Moreover, even when an international institution or treaty has gained widespread support at the systemic level, if it may have negative impacts on China's vital material interests and core sovereignty, China will not recognize its social legitimacy, as the ICC case demonstrates.

4.3 Normative Legitimacy and Strong Socialization

Normative legitimacy lies in the "principled beliefs" of states, which "consist of normative ideas that specify criteria for distinguishing right from wrong and just from unjust" (Goldstein and Keohane 1993: 9). It does not have instrumentalist connotations, but follows the logic of appropriateness. A norm or institution gains normative legitimacy at the unit level when states internalize and believe in the inherent rightness and value of the norm or institution. Principled beliefs not only regulate and constrain states' behaviors and choices, but also constitute their identities and interests (Jepperson, Wendt, and Katzenstein 1996). Accepting the normative legitimacy of an institution or a norm can further weaken the Westphalian beliefs of states and *significantly* lower the normative premiums of sovereignty costs.

For norm-receiving states, internalization comes in the final stage of a long-term process of socialization. It is a *transformation* of states' beliefs, interests, and identities. According to Ian Hurd, at the unit level, internalization results in "a kind of socialization of states that produces congruence between (perceived) interests and the legitimated rules and institutions" (2007: 41). The congruence does not lie in states choosing favorable institutions to fit their preexisting interests or adapting their strategies and choices to given institutional and social constraints, but originates in a process of remaking and redefining states' ideational interests through their

acceptance of the normative validity of an institution or a norm. A new idea with normative legitimacy can also determine which preexisting material and ideational interests are perceived as relevant for states.

The internalization effects depicted in the norm diffusion and socialization literature characterize the ideal type of normative legitimacy, which can be achieved only in the strong socialization process. If states can internalize an idea to the utmost degree, they will not even feel the conflicts between their self- and social identities or between new ideational and other types of interests, as the norm is taken for granted and norm-conforming practices are habitualized (Finnemore and Sikkink 1998; Risse and Sikkink 1998). Even if conflicts of different types of interests do emerge, states will prioritize their new ideational interests over material and sovereignty concerns. At this point, the logic of appropriateness triumphs over the logic of consequences. States should view the internalized boundary-trespassing norm or institution as morally superior to the Westphalian norm and an encroachment on their sovereignty as legitimate in a normative sense.

Although strong socialization usually evolves from weak, weak socialization does not necessarily lead to strong. A state may be in a weak socialization process for a long time without accepting the normative legitimacy of any boundary-trespassing international norms; or it may even experience setbacks and never be able to move to a strong socialization stage. Therefore, the concepts of weak and strong socialization developed in this dissertation should be viewed as two ideal-types of socialization processes, rather than two stages of one linear progressive process with a teleological purpose, as Finnemore and Sikkink's three-stage norm diffusion model (1998) or Risse and Sikkink's five-phase spiral model (1999) suggest.

In reality, the nature and strength of states' prior beliefs can often influence their ability to

internalize new norms and the degrees they are socialized by boundary-trespassing ideas. Many scholars have argued that states' preexisting local ideas can constrain what contents of a new norm states choose to accept and influence the dynamic of norm diffusion. For example, Jeffrey Legro views prior organizational culture as "a heuristic filter for perceptions and calculation" employed by actors embedded in domestic organizations in responding to international norms (1997: 36). Amitav Acharya presents a more dynamic model of norm localization and idea transmission, in which states "borrowed foreign ideas about authority and legitimacy and fitted them into indigenous traditions and practices" (2004: 244). Ideas that can be constructed to fit local norms and traditions will be better received than those that lack such potential (2004: 244).

The Westphalian norm can be viewed as a prior "localized" belief internalized by different states to various degrees. When reacting to the rise of new boundary-trespassing norms, states with strong sovereignty beliefs tend to use the preexisting sovereignty norm as a filter, or to reconstruct the new norms to fit them into their belief system. Moreover, in contrast to indigenous customs originating from the domestic society of norm-takers, the sovereignty norm is still a widely accepted international norm at the systemic level. The rise of boundary-trespassing norms and practices vis-à-vis the Westphalian norm in certain issue areas does not mean that new norms have already replaced the sovereignty norm or played more important roles than state sovereignty in the international society. Sovereign control rights are still highly valued by most states in the world. And states with strong sovereignty beliefs also have ideational interests to defend their control rights and solidify the sovereignty norm at the systemic level when encountering boundary-trespassing practices.

One necessary condition for states to overcome the restrictions of prior sovereignty beliefs and speed up the norm internalization process is the existence of strong and sustainable domestic

civil societies or transnational social networks. Especially in the absence of clear material incentives for states to accept boundary-trespassing norms, domestic civil society and transnational social forces play indispensable roles in bringing changes to states' policies towards new norms. For example, Risse and Sikkink argue that the diffusion of human rights norms "crucially depends on domestic and transnational actors who manage to link up with international regimes, to alert Western public opinion and Western government" (1999: 5). These advocacy networks can put norm-violating states on the international agenda, empower and mobilize domestic oppositions, social movements and NGOs, and create a transnational structure exerting international and domestic pressures on norm-violating regimes simultaneously (Risse and Sikkink 1999: 5).

If domestic and transnational social forces can be strong enough and gain access to the process of states' preference formation, they can translate their normative commitments into states' ideational beliefs and national interests. The bottom-up approach of norm internalization can greatly weaken states' sovereignty beliefs and reduce the normative premiums of sovereignty costs to the utmost degree. Nevertheless, if domestic civil society is weak vis-à-vis the state and transnational social networks cannot effectively influence states' preference formation, socialization and norm internalization will be a prolonged and incremental process, and states' beliefs in the sovereignty norm are unlikely to experience transformative changes.

The Western European countries are prototype states of strong socialization and normative legitimacy in today's world. They often play leadership roles in promoting boundary-trespassing norms and setting the highest normative standards for the international society to follow. Although material interests and the Westphalian sovereignty still play indispensable roles in policymaking in Europe, the degree to which European states internalize boundary-trespassing

norms, such as economic and political integration, human rights, and legalization, are the highest among all states in the international society. In fact, most arguments in the “new sovereignty” literature about the decline of state sovereignty are derived primarily from the experiences of Western Europe and the EU. For example, Georg Sorensen (1999) and Robert Keohane (2002) characterize the new boundary-trespassing organizing rules of states’ control rights in Europe as “post-colonial sovereignty” and “pooled sovereignty,” respectively. Daniel Philpott (2001; 2010) also treats “European integration” as one major force⁶ contributing to the curtailments of state sovereignty in international relations today. European countries’ sovereignty practices and their approaches to boundary-trespassing norms in recent decades have won them a new name of “*normative power*” (Manners 2002; Diez 2005; Dunne 2008), which is in sharp contrast to their old reputation of the origin of Westphalian sovereignty and the balance of (material) power in the pre-WWII era.

4.3.1 The Implications of Normative Legitimacy on China’s Approaches to Delegation

Different from European experiences, where the acceptance of the normative legitimacy of boundary-trespassing ideas plays increasingly important roles in states’ policy making, the changes in China’s policies on the BITs and the UNCLOS stem mainly from the expansion of its material interests and its acceptance of the social legitimacy of the treaties, rather than its internalization of new norms. Two major factors prevent China from fully internalizing and recognizing the normative legitimacy of boundary-trespassing norms.

First, the Westphalian norm that China has internalized since entering the modern world of nation-states has become a strong prior localized belief and played a filtering role for evaluating the normative legitimacy of international institutions and boundary-trespassing norms.

Integration with the international society in the reform and opening period has indeed

⁶ The other force Philpott discusses is the rise of conventions on human rights (2001; 2010)

gradually reshaped Chinese leaders' perceptions of national interests and softened their stances on state sovereignty. Yet, the ideal international society in Chinese leaders' perception is more like Hedley Bull's society of states (1977), where sovereignty is the pivotal norm regulating inter-state relations, rather than a society whose authority is shared among different types of actors and whose main constitutive rules are boundary-trespassing in nature. As China still believes in the normative legitimacy of the Westphalian sovereignty, it functions as its "entrepreneur": advocating and defending the sovereignty norm in the international society is China's major ideational interest.

China may selectively recognize the moral validity of certain boundary-trespassing norms that conflict the least with state sovereignty, but will reject the normative contents that have negative impacts on China's core sovereignty. China's stances and approaches toward human rights norms is an example of how prior Westphalian belief constrains internalization effects. China reconstructs and promotes the "rights of development and subsistence" as the most fundamental human rights, but downplays the importance and rejects the universality of civil and political rights (Kent 1999). Leaders believe that the latter have only relativist value and can be achieved only under certain economic and social conditions. China is more open to the "rights of development and subsistence" mainly because those rights are more compatible with state sovereignty and can be promoted by collective and statist means; while civil and political rights empower individuals and activists vis-à-vis the state, encroach greatly on state sovereignty, and pose threats to the legitimacy of China's political regime.

Second, the characteristics of China's strong "party-state" discourage the formation of transnational social networks and curtail the internalization of boundary-trespassing norms at the societal level.

Transnational social networks are easier to form and take effect when the power of the state is relatively weak vis-à-vis society, and when the formation of states' preferences is more open to social actors. Although a variety of studies have shown that foreign policy-making in China has become more pluralist than ever, and that authoritarian China is by no means a seamless unity especially regarding foreign economic policies (see for example, Fewsmith and Rosen 2001; Mertha 2005, 2008; Kennedy 2005; Zeng ed., 2007), the "party-state" still plays a dominant role over the society in all major domestic and foreign policy issues. As leading Chinese legal scholar Zhu Suli argues, the ruling Chinese Communist Party (CCP) and the state have become a symbiotic unity. The Party's control and influence over society and the machines of the state are ubiquitous: "it penetrates every aspect of society" (Zhu 2006: 535). Societal forces and transnational networks can exist and have influence only within the range tolerated by the state and the regime.

So far, China's internalization of boundary-trespassing norms is still limited. Transnational social networks can resort to Western governments or international regimes and indirectly influence China's policy choices from the outside, but cannot effectively spread new norms at China's societal level, mobilize domestic social supports, or directly influence the state's preference formation from within. Only when some state bureaucrats in relevant governmental branches become sensitive to international social pressures, or feel sympathy to international norms through their interactions with other diplomats in the international arena, can China's foreign policy exhibit some changes deviating from the Westphalian sovereignty (Johnston 2008). In that sense, China's socialization into the international society also has statist features. Government officials are the agencies of the party-state; their acceptance of boundary-trespassing norms is conditional on the reconciliation between those norms and China's core

sovereignty and fundamental material interests. Without a strong domestic civil society to transform the state from within, China is unlikely to accept the normative legitimacy of boundary-trespassing norms, and the normative premiums of sovereignty costs are unlikely to decrease significantly in the near future.

Therefore, as Table 1.4 shows, China's behavioral patterns towards international treaties with mandatory DSMs can be summarized as follows:

- China will delegate disputes only in non-core issue areas, where sovereignty costs are relatively low, but not in core issue areas, where sovereignty costs are very high.
- China is more likely to ratify a treaty with mandatory DSM if China's vital material interests can be enhanced by participating in the treaty and China believes in the congruence between the treaty and its long-term strategic interests.
- Given that China's core sovereignty can be exempt from the mandatory DSM of a treaty, China is more likely to accept the social—but not the normative—legitimacy of a treaty, if the majority of states ratify the treaty, and Chinese leaders believe that the widespread legitimacy of a treaty at the systemic level represents an inevitable historical trend or a transformation of the international order.
- China is less likely to accept a treaty's legitimacy and ratify a legalized treaty if a treaty does not provide enough material incentives, or does not allow reservations for China to minimize sovereignty costs and exclude its core sovereignty.

Table 1.4: China's Approaches towards Legalized Treaties

Cases	Material Benefits	Reservations	Legitimacy	Sovereignty Costs	Ratification
BITs	Yes	Yes	Yes	Low	Yes
UNCLOS	Yes	Yes	Yes	Low	Yes
ICC	No	No	No	High	No

5. Research Design and Methodology

States may cede control rights to international authorities for a variety of reasons: changes in material incentives, weak socialization, internalization of boundary-trespassing norms, or the combination of both material and ideational factors. For individual states, the relative weights of material and normative forces in driving boundary-trespassing changes may be different, and the degree to which the normative premiums of sovereignty costs can be weakened by alternative norms varies across countries. Without detailed unit-level analyses of the nature of changes and continuities in states' approaches to sovereignty, one cannot simply claim the irrelevance of the sovereignty norm in today's international society.

5.1 The Hard Law Setting and Case Selection

This dissertation examines the causes of the changes and continuities in China's approaches to state sovereignty in a high-cost setting of legalization. Legalization, especially the case of international treaties with mandatory DSMs, is important for studying the relations between China and the international society for the following two reasons.

First, international treaties with high sovereignty costs are better settings than soft institutions for researchers to evaluate the *relative weights* of different mechanisms in driving

China's changes and to understand the dialectic relations between changes and continuities during China's integration with the international society. Prior literature on China and the world usually identifies the combination effects of both material and normative factors in driving changes in China's policies, yet pays less attention to differentiating the relative weights of various factors (for example, Kent 1999; Foot 2000; Carlson 2005). Alternatively, it tends to give normative forces more importance in contributing to the changes (for example, Johnston 2008). One reason is that many studies focus on China's policies and behaviors in soft institutions, which do not require too much delegation and thus prevent scholars from studying how China behaves if it has to cede significant portions of control rights or if its core sovereignty is at stake. As states are usually willing to cooperate if participation is low-cost in nature, soft institutions and law tend to "bias" our findings toward changes rather than continuities. In that sense, China's discourses, behaviors, and policies as observed in soft institutions are truncated data, and do not allow enough observations for us to discover the *limits* and the *relative weights* of different mechanisms in driving changes.

The purpose of using hard laws as settings in this dissertation is not to invalidate, but to enrich previous studies on China and the world and provide a more complete picture of China's changes and continuities during its integration with the world. As the empirical chapters show, many findings of this dissertation do not conflict with previous discoveries by China experts, but emphasize more the dialectic relations between changes and continuities and the relative weights of material and normative forces in determining them. Although material incentives play a more important role than the essential social legitimacy for China to accept boundary-trespassing treaty provisions, the normative factor of the sovereignty belief, especially in core issue areas, determines the continuities of China's approaches to sovereignty and legalization. It is exactly

because Chinese leaders internalize and accept the normative legitimacy of state sovereignty that boundary-trespassing norms and trends can only incrementally weaken the sovereignty belief and can lower the normative premiums of sovereignty costs to limited degrees. Moreover, in many circumstances, continuities are no less important than changes and may be the causes of those changes. As the BITs and UNCLOS cases show, only when China can use reservations to lower sovereignty costs or exempt territorial disputes from the mandatory DSM (continuities) will it sign and ratify the treaties (changes). In contrast, since the ICC does not allow any flexible arrangements for China to opt out its core sovereignty (no continuity), China refused to sign it (no change).

Second, hard laws with high sovereignty costs are especially important for examining the socialization effects of boundary-trespassing norms and *differentiating* the mechanisms of social and normative legitimacy in driving changes in states' policies. As the theory developed in this chapter shows, states would like to accept binding legal obligations. This is not only because the material benefits are necessarily higher than the material costs, but also because they accept either the social or the normative legitimacy of boundary-trespassing norms, and thus the normative premiums of ceding control rights can be reduced in the socialization process. The *more* a state is socialized by boundary-trespassing norms, the higher the substantive sovereignty costs (C) it can bear to conform to the new norm, and the *more* likely it supports legalized DSMs in relevant issue areas. If a state only bears low sovereignty costs and does not want to take on any substantive binding legal obligations, it is unlikely to enter into the stage of strong socialization and truly internalize or accept the normative legitimacy of a boundary-trespassing norm. Therefore, a hard law with high substantive sovereignty costs is the *hardest* socialization test for a potential "socializee" to pass.

Prior literature on China's integration with the world has shown that China's interests, behaviors, and policies have changed significantly in almost every issue area (see, for example, Kim 1994; Kent 1998, 2007; Economy and Oksenberg eds., 1999; Foot 2000; Lardy 2002; Carlson 2004, 2005; Pearson 2004, 2006; Johnston 2003, 2008). Nevertheless, the benchmarks scholars use to gauge those changes are China's behaviors at the very beginning of economic reform in the early 1980s or its policies in the brief isolation period immediately after the Tiananmen incident. Indeed, if using China's *own* past as a reference, China's discourses and behaviors in soft institutions are enough to demonstrate the *unprecedented* degree to which today's China is socialized by international norms and institutions. However, as the institutional and normative environments of the international society have constantly evolved, to understand how deeply China integrates with the world requires us to examine whether China's changes are in accordance with the development of new social trends, what the nature of the changes are, and how far China's positions are from the "majority will" of the international society. Because the ongoing trend of legalization in today's world indicates that the international society has reached new institutional and normative equilibriums in many issue areas, and because China is by no means an outsider in the world anymore, it is time to adopt the higher benchmark of legalization to gauge the depth of its integration and the limits of its deviation from the Westphalian norm.

This dissertation uses a small-N case study approach to examine China's decision making on signing and ratifying international treaties with mandatory DSMs. There are currently four types of legalized treaties with mandatory DSMs at the global level: the WTO, the BITs, the UNCLOS, and the Rome Statute of the ICC.⁷ China rejects the Rome Statute, but has ratified the

⁷ There are other legalized treaties and institutions at the regional or sub-regional levels, such as the European Court of Justice and the European Convention on Human Rights. But as those institutions do not have direct impact on China, they are excluded from this study.

other three types of treaties.⁸ The three cases of the BITs, the UNCLOS, and the Rome Statute of the ICC cover a nearly universal sample of legalized treaties at the global level, and allow enough variation in both time and issue dimensions. Moreover, China's different stances and policies towards the three treaties also enable the case selection to avoid the problem of selecting on the dependent variable, as the UNCLOS and the BITs are two positive cases, and the ICC is a negative case.

The BITs are bilateral international agreements establishing the terms and conditions for private investment by nationals and companies of one country in the jurisdiction of another. Those treaties have become the most important international mechanisms governing foreign direct investment (FDI) among states (Elkins et al. 2006: 811).⁹ Sovereignty costs of BITs signed between different countries in different time periods vary greatly.¹⁰ High-cost treaties usually grant foreign investors national treatment and involve the International Centre for Settlement of Investment Disputes (ICSID), an independent arbitration tribunal affiliated with the World Bank, as the last resort to solve investment-related disputes between states and private foreign investors. Yet if both contracting parties agree, states can lower sovereignty costs to a certain degree through certain flexible arrangements, such as requiring private investors to use up domestic legal or administrative DSMs before going to the ICSID and using a "standstill" clause to exclude preexisting discrepancies between treaty obligations and state practices from a treaty's jurisdiction.

⁸ The main reason that this dissertation does not treat the WTO as a separate case is that major driving forces for China to participate in the WTO are similar to those that lead it to sign legalized BITs. To a certain extent, China's acceptance of hard BITs is associated with its decision making on the WTO. Therefore, the BIT chapter will also address the common underlying forces for China to join the two types of economic treaties as well as the relations between the WTO and China's decision making on legalized BITs.

⁹ Although the BITs are bilateral agreements between two parties, they can be treated as global-level international law, as most states have belonged to the network of the treaties.

¹⁰ All BITs China has signed can be downloaded from the website of the Ministry of Commerce of China: <http://tfs.mofcom.gov.cn/aarticle/Nocategory/201111/20111107819474.html>. Accessed: 05/31/2013.

The UNCLOS is a comprehensive international treaty covering ocean-related economic, environmental, and territorial issues.¹¹ It provides four possible dispute resolution venues: (a) the International Tribunal for the Law of Sea (ITLOS), (b) the International Court of Justice (ICJ), (c) an arbitration tribunal constituted in accordance with the Annex VII, and (d) a special arbitral tribunal constituted in accordance with the Annex VIII. States can choose any of them as preferred DSMS. Even if states do not make choices, once they ratify the treaty, they automatically consent to delegating disputes to arbitration as required by the Annex VII. Nevertheless, the hard law nature of the Convention was diluted to a certain extent by its exclusion clause, which allows states to exclude the most sensitive territorial and security issues from the treaty's jurisdiction. States that apply the exclusion clause to opt out of certain treaty obligations will bear less sovereignty costs than states that do not.

The Rome Statute of the ICC is a hard law in international humanitarian and human rights issue areas; it imposes high sovereignty costs on party states for three reasons.¹² First, the ICC is a strong and independent court holding automatic and compulsory jurisdiction over the core crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. Second, the Prosecutor of the ICC can initiate an investigation not only when a situation is referred to him/her by state parties or by the Security Council (SC), but also with the consent of the Pre-Trial Chamber, on the basis of information received from other sources such as individuals or NGOs. Third, the Rome Statute lacks an exclusion clause and does not allow any substantial reservations for states to opt out of treaty obligations.¹³ Therefore, states cannot selectively

¹¹ The full text of the treaty can be found at the UN website:

http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Accessed: 05/31/2013.

¹² The full text of the treaty can be found at the UN website:

[http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf). Accessed: 05/31/2013.

¹³ Under article 124, on becoming a party to the Statute, a state can declare that it does not accept the jurisdiction of Court with respect to war crimes for a period of seven years after the Statute enters into force for that particular state. However, seven years is a short period, and the exemption is limited to war crimes.

accept the Court's jurisdiction to lower the sovereignty costs of the Rome Statute.

5.2 Level of Analysis

This dissertation treats China as a “quasi-unitary” actor and takes a “quasi-statist” view to study China's approaches to sovereignty and legalization; it relies more on China's official ideology, formal government positions during negotiations, and officials' statements and works than on academic elites', social actors', or public opinions as main sources to identify China's sovereignty beliefs and its degree of socialization. I characterize the level of analysis of this dissertation as “*quasi-unitary*” or “*quasi-statist*,” because I do not assume the state as a black box with unified national interests for the convenience of theory build-up; nor do I deny certain fragmented features of the Chinese bureaucratic apparatus or the increasingly important roles of academic elites and social actors in China's foreign policymaking. Yet, this dissertation tries to highlight and focus primarily on the statist aspects of China's decision-making, which originate from its single-party regime character and greatly influence the degree to which it is socialized by boundary-trespassing international norms.

Prior literature on China's foreign policies in recent decades has increasingly emphasized the pluralist features of China's policymaking at two levels. First, the structure of the Chinese bureaucratic apparatus is often fragmented rather than unified, and the policy-making process is full of conflicts and frictions among different government agencies and elite groups (Jacobson and Oksenberg 1999; Mertha 2005; Liang, W. 2007). Second, the policy-making process is not monopolized by political leaders and government officials, as non-governmental social forces such as academic elites, NGOs, interest groups, and even public opinion have had increasing input (Kent 1999; 2007; Carlson 2005; Foot 2000; Johnston 2008; Foot and Walter 2011). All those studies correctly characterize some important aspects of China's foreign policies, yet they

should not be interpreted as a dismissal or denial of certain statist features of China's decision making. In fact, statism and more diverse bureaucratic and social interests should be viewed as two sides of the same coin. If using China's own past as a reference point, its foreign policymaking has experienced a steady trend of professionalization and decentralization, and social forces have greater influence on China's foreign policies during the reform and opening-up period. Nevertheless, given that China is the largest non-democratic state in the world, its single-party regime character still means that the power of the Chinese state vis-à-vis civil society is greater than that in most democratic countries. In another words, in cross-country comparison—especially in comparison to European countries, which are models of “new sovereignty” and entrepreneurs of new boundary-trespassing norms in the international society—the statist features of China's foreign policymaking becomes more significant, and the degree of openness and transparency of China's decision-making process still cannot match that of mature democratic states.

Therefore, in this section, I will briefly elaborate on the “quasi-statist” features of China's foreign policymaking from the following four aspects: the indispensable and deterministic roles of top leaders in final decision making regarding important foreign policy issues; the relatively neutral characteristics of the Ministry of Commerce (MOFCOM) and the Ministry of Foreign Affairs (MOFA) as leading agencies in coordinating policy positions among domestic bureaucracies; the importance of Chinese official ideologies as the most orthodox and well-vetted products of the Chinese ideological machine in unifying the thoughts of the nation and coordinating multiple actors; and the often lagging inputs from academic elites and other non-governmental social actors as well as the limited influence of different voices on government decisions regarding international treaties with hard law features.

First, in terms of the importance of the highest leadership, although many studies emphasize ever more diverse interests and open policymaking processes in China, many of them also indicate that final decisions regarding important policy issues are usually made by the highest leaders directly, and that top leaders are essential to setting up “general principles” and breaking bureaucratic gridlocks during international negotiations. Therefore, the norms and ideas of top leaders will have the most important impacts on China’s foreign policies and negotiation positions. For example, in his study of China-US negotiation on intellectual property rights (IPR), Andrew Mertha clearly depicts China’s decision making structure: during the negotiations, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC—predecessor of the current MOFCOM) played a coordination role among different bureaucratic agencies, which had direct input regarding technical issues at the “working level” and helped the MOFTEC to formulate China’s “bargaining spaces.” However, once the lower-level inter-agency bargaining resulted in a negotiation impasse, only direct intervention from the top leaders could help break the deadlock (Mertha 2005: 70). Moreover, officials from the highest level of the Chinese government had more direct influence at the “political level”, which is characterized by “choosing the option most consistent with the overall political consideration of the top leadership from a small set of policy options presented by MOFTEC”. As Mertha points out, “Whether disposing of a particular negotiation point or breaking a deadlock, the top leadership’s intervention into the negotiation process was essential for it to move forward” (2005: 75).

Similarly, although most literature on China’s WTO accession tends to focus on the prolonged domestic bargaining among different governmental agencies, which represent the interests of various industries, those studies also demonstrate the indispensable role of top leaders in making the final decision. As Wei Liang says, the pluralization and decentralization of

China's decision making process could only explain the slowing down and gridlock of China's WTO negotiations, as bargaining among different ministries created obstacles for WTO policy formation; only after former Premier Zhu Rongji initiated an ambitious institutional restructuring and promoted the MOFTEC to the position of lead agency in international economic negotiation did the coordination problems among domestic agencies ease (Liang 2007: 20; 22; 32). Moreover, direct intervention from former President Jiang Zemin and Premier Zhu Rongji in the final stage of the WTO negotiations has been well recognized by WTO experts as the most important factor in China's WTO accession (for example, Fewsmith 2000; Lardy 2002; Pearson 2001; Feng 2006; Liang 2007). As Wei Liang puts it, "Existing studies of Chinese foreign policy unanimously agree that the role of top leaders has always been foremost in Chinese foreign policy-making, even under the current trends of decentralization and pluralization" (Liang 2007: 34). Liang also suggests that the expansion of domestic actors in China's foreign policymaking should not be exaggerated—especially in a strategic decision like China's GATT/WTO accession—since the involved actors were restricted to those at the ministerial level, while local governments, most affected companies, and the general public were largely excluded from the decision making process (Liang 2007: 36). Several Chinese WTO scholars at Peking University and Remin University also confirmed during interviews that the most critical final decisions were made directly by top leaders, who would not only consider the gains and losses of a single industry, but would balance the overall economic and political benefits and costs for China as a whole (Interviews BJ080224; BJ080305).¹⁴

Second, the Ministry of Commerce (MOFCOM) and the Ministry of Foreign Affairs (MOFA) are two major leading central agencies coordinating negotiation positions and policy

¹⁴ The codes of interviews follow the following rules: the first two letters indicate the location of an interview; NY means New York and BJ means Beijing. The following numbers indicate the date of an interview, following the

goals among different bureaucracies: the former concentrates primarily on economic issues, while the latter is in charge of all other types of foreign affairs. Although the two agencies are not entirely free of their own departmental interests, they follow the central will and the “general principles” of China’s foreign policies more closely than do other bureaucracies. According to interviews with several government officials in both MOFCOM and MOFA, although the two agencies are not the most powerful domestic actors, they are the “*most neutral*” governmental ministries in foreign policymaking, as they pursue policy goals and set up negotiation positions based on China’s overall national and strategic interests and faithfully carry out the spirit and guidelines of the center rather than representing any special interests (Interviews BJ080322; BJ080410; BJ080426). In terms of technical issues, the MOFCOM and MOFA do rely more on input from other ministries whose jurisdiction covers relevant issues to form China’s bargaining spaces; yet these two ministries play an important gatekeeping role to ensure that the overall negotiation positions are in line with the “general principles” set by the highest leaders.

In fact, not all types of international negotiation will necessarily involve a broad range of governmental agencies and conflict interests; whether and at which level other ministries will participate in an international negotiation depends on the nature of the issues. Since the WTO accession would have significant distributional impacts on almost every economic sector, China’s negotiation positions must reflect the balance of interests of all major impacted ministries.

In contrast, BIT negotiation has never been as salient and politicized as the WTO accession in China, as it does not have broad distributional effects on different industries; moreover, since the WTO Agreements incorporate significant obligations of liberalizing foreign investment, the process of the WTO negotiation had removed many institutional and ideational obstacles for

China to sign legalized BITs. As interviews with government officials in the MOFCOM indicate, China's decision making in signing the new BITs since the late 1990s has become a routinized practice, and the Department of Treaties and Law of the MOFCOM is the only agency in charge of negotiating and signing the treaties; in fact, many MOFCOM officials from other departments had never even heard of BITs (Interviews BJ080302; BJ080418; BJ080426).

In terms of the UNCLOS, according to a government official in the MOFA who worked in the UNCLOS division, when negotiating special and technical treaty provisions, the MOFA relies on the relevant ministries to formulate China's negotiating positions; for example, if the treaty provision were about fishery, officials from the Ministry of Agriculture would directly participate and negotiate the relevant treaty provisions. Nevertheless, if the issues are political, such as maritime demarcation or dispute resolution, the MOFA would play a leadership role and function as a gatekeeper to ensure that China's critical national and sovereign interests would not be compromised (Interview BJ080514). In this situation, different government bureaucracies do not necessarily have conflicts of interest, but a division of labor based on their different jurisdictions. And even if lower-level inter-agency coordination results in negotiation gridlock, top leaders' intervention will ensure that the final policy outcome does not deviate from the general principles and policy goals promoted by the center of Chinese leadership.

Third, official Chinese ideology carefully orchestrated by the center of the CCP also provides a coherent ideational framework for policy formation and justification. Although the role of ideology in today's China has been much weaker than in Mao's era, given the nature of China's ruling party and political regime, it is still one important source of legitimacy for the CCP's leadership. As David Shambaugh puts it, "To reject the underlying ideology is to reject the party's *raison d'être* itself" (2008: 104-105). Nevertheless, because of China's pragmatic turn

under Deng Xiaoping's leadership and the rise of diverse and pluralized interests and ideas in its society, the role of official ideology in today's China has been largely downplayed or ignored by most China experts. Even scholars who study this topic tend to view the current ideology as merely tools or a "post hoc rationalization device" for the CCP to justify its policy choices rather than an ideational focal point that can provide meaningful guidelines for policymaking (see, for example, Shambaugh 2008).

In order to correctly understand the meanings and functions of Chinese official ideology in the reform and opening-up period, one should not treat the CCP's ideology as a rigid ideational product containing mainly Marxism-Leninism and the thoughts of Mao Tse-tung, but a resilient, eclectic, and continuously evolved system of ideas whose sources include not only traditional Marxist theories, but also rising international norms, cultural elements of Chinese civilization, and the experiences of China's own reform practices. In fact, one important reason that the CCP can successfully maintain its ruling position while most other communist regimes collapsed decades ago is its firm control over the ideological terrain and, at the same time, the continuous reform and enrichment of its ideology to adapt to China's specific situations in different times.

Such a flexible and practice-oriented feature does not develop only in the reform and opening-up era, but has been an innate feature of the CCP's ideology. In his early studies on the CCP, Franz Schurmann categorized its ideology into "pure" and "practical" types: the former functions as a unified worldview for individuals, while the latter is "a set of ideas designed to give the individual rational instrument for action" and to guide his or her practices (Schurmann 1968: 22). In the 1950s and 1960s, pure ideology in China referred to the theory of Marxism-Leninism, while the latter refers to the thought of Mao Tse-tung, which is a "Sinification of Marxism," i.e. applying the truth of Marxism-Leninism to the special conditions and practices of

the Chinese revolution (Schurmann 1968). As Schurmann says, not all communist parties have a practical ideology. For example, the former Soviet leaders were never able to successfully develop the kind of ideology that Mao did in China; since Stalin's theories were elevated to a position of pure ideology in his own time, leaders after his death could not modify the Soviet ideology without causing serious ideological and legitimacy crises for the ruling party (Schurmann 1968). In contrast, Mao's thought is important for China not because it represents universal and eternal truth, but because it drew useful elements from the pure ideology of Marxism-Leninism to fit China's specific situation and practices in a particular time.

In fact, what really matters in China has always been the practical ideology, which is not a finite set of ideas, but continuously evolves as situations change over time. On the one hand, practical ideology is an induction from realities and China's practices and can function as a policy justification; on the other hand, once the official ideology is established, it provides general principles and guidelines for policymaking and future practices. This practical feature of Chinese official ideology also enables the post-Mao leadership to continue to develop and modify the ideology to accommodate to China's reality and keep up with the times. In that sense, the official Chinese ideology advocated by each new generation of leadership in the post-Mao period (such as the "Theory of Deng Xiaoping", Jiang Zemin's works, and Hu Jintao's discourses) all have a similar purpose and function to the thoughts of Mao Tse-tung in his own time: to solve the problems in China's practices.

In order to reform and enrich the official ideology, Chinese leaders and the center of the CCP not only need to reconcile traditional Marxist theory with China's new realities, but must also incorporate rising and dominant international social norms and borrow useful elements from China's own traditional culture. Although the ideology is often characterized by the statements

and works of the highest leaders, it not only reflects the personal beliefs and preferences of the top leaders themselves, but also represents the consensus and collective efforts of the CCP's ideological machine. For example, the three-volume *Selected Works of Jiang Zemin* published in 2006 was edited and completed under the personal guidance of Jiang's successor Hu Jintao and the Political Bureau of the CCP Central Committee; Jiang Zemin himself examined and approved all of the articles. In that sense, the collective leadership of two decades was responsible for creating these official ideological documents.

Because of the eclectic and continuously evolved feature of Chinese official ideology, it is an authoritative and reliable source for us to trace the norms and ideas advocated by the center of the CCP, the degree to which Chinese leaders internalize different norms, and the official lines on many important domestic and foreign policy issues. For instance, in the *Selected Works of Jiang Zemin*, one can identify economic globalization and human rights ideas as two major boundary-trespassing international norms influencing Chinese leaders' sovereignty beliefs regarding economic control rights and sovereign authority. Yet Jiang's discourse shows great enthusiasm about globalization, viewing it as an inevitable trend independent of men's will; he is more cautious about the negative impacts of human rights, viewing this norm as a potential instrument of the West to interfere in China's domestic affairs. In that sense, Chinese leaders and official line embrace economic globalization more strongly than human rights ideals, and the normative premiums of ceding control rights decrease more in economic than in human rights issue areas. This observation is consistent with and can shed some light on China's different policy choices regarding the BITs and the Rome Statute of the ICCs.

Fourth, the quasi-statist features of China's foreign policymaking are also evident in the often lagging inputs from academic elites and other social actors, especially the limited influence

of boundary-trespassing voices on government decisions regarding international treaties with *hard law* features. In the reform and opening-up period, non-governmental intellectuals in research institutes as well as a variety of societal actors have indeed played an increasingly important role in foreign policymaking in various issue areas. Nevertheless, the strength of their voices is usually conditional on the timing of a decision as well as the salience of an issue. Scholars' and society's inputs at the very early stage of policymaking are much more limited than in the later stage when the issue becomes more salient and arouses more awareness among non-governmental actors.

As the available empirical evidence shows, in the three hard law cases examined in this dissertation, academic and social actors did not have obvious and direct input into government decisions in the early stage, i.e., from the government's initial participation in international negotiations to the point that a treaty was formally adopted. In terms of intellectuals' influences, one important source to trace Chinese scholars' opinions and policy stances is the Chinese Academic Journal Database, which contains all academic journal articles published in China since 1915. I used both title and keyword searches¹⁵ for the concepts of “the BITS” [shuangbian touzi tiaoyue/xieding], “the ICC” [guoji xingshi fayuan], and “the UNCLOS” [haiyang fa] to extract every article related to the three types of law available in the database.

¹⁵ To ensure the completeness of the search result, I did three levels of searches. The first level is a title search, which results in all the articles whose titles contain at least one of the three concepts. This search method generates the most relevant articles, as each one's focus is one of the three laws examined in this dissertation. The second level is a keyword search, which results in more articles than the title search; although this method can generate some relevant articles omitted by the title search, most of these are not quite relevant to the theme of this study. For example, if using a title search for the concept of “the ICC” [guoji xingshi fayuan], there is only one article before 1998 discussing the establishment of the ICC; although the keyword search results in nine additional articles written by Chinese scholars before 1998, only one of them discusses the ongoing event of negotiating the ICC in one section; the remaining eight articles mention this concept but do not relate it to the ongoing international negotiation. The third level is the full text search, which generates the most articles, but is the least reliable search method because many of those articles, if not caught by keyword and title searches, usually mention the concepts once or twice for random reasons, or even do not include any of the search concepts due to searching errors. Moreover, the error of generating articles that do not contain any of the searching concepts is very high in full text search, because many of

The search results show that although China started to renegotiate and sign legalized BITs in the late 1990s, scholars' works in China's Academic Journal Database did not pick up this change until 2003, and most of the new academic works express even more conservative views on sovereignty than the government's approaches; some influential BIT experts even suggested that the government should not continue signing legalized BITs or should differentiate two types of countries—signing legalized treaties with only developing, but not with developed states (see, for example, Chen, An 2007). Similarly, although the international society had started negotiations on the establishment of the ICC in the early 1990s, only two academic articles (published in 1997) in the Database had ever discussed the negotiation of the ICC before 1998, when China voted against the Rome Statute at the Rome Conference. In contrast, research on the treaty and the ICC has burgeoned since the Rome Statute was adopted, as title and keyword searches for the concept of ICC result in about 400 relevant articles in the Database; scholars' opinions have also been more diverse than government positions since 1998.

The UNCLOS case shows the same pattern. Before 1982, when the government negotiated the treaty, there were only two academic articles written by Chinese scholars (in 1980 and 1981), introducing the Third UN Conference on the Law of the Sea; but after the UNCLOS was adopted, ever more scholars began to study the UNCLOS and discuss the possibility for China to ratify the treaty, as title and keyword searches for the concept of the Law of the Sea generated about 120 articles from 1982 to 1996.¹⁶ Among those 120 articles written before China's

the full text documents in the database before the early 2000s are not machine readable PDF files. Therefore, the empirical results reported in this dissertation are based on both title and keyword search, but not on full-text search.

¹⁶ In contrast to the above mentioned examples, the WTO accession and post-WTO negotiations have generated lots of debates and discussions among scholars and the general public. One important reason is that China's accession negotiation took more than 14 years and the issue had become salient enough during the long and arduous process. In contrast, the ICC negotiation took only about 4 years, and the first new BIT was signed after just 2 years when Chinese leaders started to deliberate the "going out" strategy. Although non-official actors' voices were obviously louder in the WTO than in the other hard law cases, their influences on government decision making should not be

ratification of the UNCLOS, more than one third were contributed by government officials or policy analysts affiliated with various government branches.

Although one may argue that the academic journal is not the only source for academic elites to express their opinions, the number of research articles on a policy issue itself is an effective indicator of the degree of scholars' awareness and the strength of their voices. The highly disproportionate rate of scholarly works in China's academic journals in different periods reveals that intellectuals' voices are much more dormant and sporadic in the early stage of negotiating and signing hard laws. Given that academic elites are usually the most informed non-official actors and public opinion leaders in China, if their discussions on negotiating a hard law are limited, it is less likely that other social actors will be enthusiastic about the issue and exert meaningful pressures on the government.

The weakness of academic and other social actors' voices in the critical stage of China's decision making regarding negotiating and signing hard laws is also confirmed by interviews with government officials. For example, when a MOFCOM government official was asked whether any domestic companies or scholars had pushed the government to sign more legalized BITs, he said that signing treaties was basically a state behavior [guojia xingwei] and that other actors, even large companies with overseas businesses, rarely lobbied the MOFCOM for new BITs.¹⁷ In contrast, the MOFCOM approached domestic firms to inform them about the changes in China's BITs. In fact, many Chinese firms did not yet have an awareness of using international legal means to protect their interests. For example, when the MOFCOM held a

exaggerated. As Wei Liang suggests, the involved actors were restricted to those at the ministerial level, while non-official actors were largely excluded from this process (2007: 36).

¹⁷ The only exception he mentioned was a large state-owned oil company that had business in Venezuela; because the Venezuelan government imposed high taxes on international oil firms, the company asked the MOFCOM to sign BITs with Venezuela in the late 2000s—several years after the MOFCOM started renegotiating new BITs—so that it could make use of the treaty to bargain with the Venezuela government for lower taxes (Interview BJ080412). However, China still has not signed a BIT with Venezuela, probably because Venezuela is not interested.

conference in the 2007 and asked participating Chinese firms about their opinions on what types of treaty provisions were beneficial for them, most companies did not know about the BITs and thus were unable to offer concrete suggestions (Interview BJ080412). Other officials in MOFA and MOFCOM said that although the government would occasionally consult scholars in relevant fields, many of their opinions could not be used as bases of decision making, because scholars usually did not have practical experiences; in fact, government officials in the Department of Treaties and Laws in both MOFA and MOFCOM were themselves legal experts; they not only had academic legal knowledge, but because they were working in the forefront of negotiating and making international laws, they were also more aware of the most recent legal developments and normative trends in the international society than were many legal scholars (Interviews BJ080322; BJ080414).

Nevertheless, as an issue becomes more salient and generates more awareness, ever more intellectuals and social actors will participate in policy discussions, and their voices will become louder and more diverse over time. Yet, whether their opinions and pressures can lead the government to a more boundary-reinforcing or -trespassing direction in the long run is an open-ended question. It is determined not only by the nature of an issue itself, but also by other factors such as China's relative power, international pressure, and the coherence of alternative opinions.

In general, boundary-trespassing social forces tend to have more influence on government policies regarding soft laws than hard laws. As many China experts show, the influence of Chinese intellectuals as well as domestic and transnational social networks on government approaches to soft laws in non-core regional cooperation, human rights, and environmental issue areas have indeed increased in recent decades (Johnston 2008; Kent 1999, 2007; Foot 2000; Foot and Walter 2013). For example, Chinese scholars' studies on global warming and climate change

as well as the rise of environmental NGOs in China have gradually influenced government policies on environmental issues and played indispensable roles in socializing China into the international environmental regime over time. Partly due to the rising social awareness and pressures and partly due to the increasingly deteriorated environmental realities, official Chinese stances towards international environmental cooperation and several important treaties regarding climate changes—such as the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol and the United Nations Framework Convention on Climate Change and its Kyoto Protocol—have become more open and supportive (Kent 2007; Foot and Walter 2013).

Nevertheless, the influences of intellectuals and social actors, as well as the degree to which China is socialized by boundary-trespassing environmental norms, are not without limits. The Chinese government has always emphasized the “common but differentiated responsibility” principle, requiring only developed countries to take on substantial responsibilities, while trying to avoid binding treaty obligations for China. Similarly in other issue areas, despite increasing boundary-trespassing voices in both domestic and international societies, the Chinese government has always advocated flexible exclusion and reservation clauses to soften a treaty’s obligations and lower its sovereignty costs. Once some treaty provisions of a soft law exhibit hard law features, or a soft law shows a tendency of moving towards hard law in the subsequent renegotiation process, China will make reservations to exempt itself from binding treaty obligations, or oppose the trend of legalizing a soft law, if its material and strategic interests will not be enhanced by relevant treaty provisions (please see the conclusion chapter for more detailed discussion on this point).

5.3 Data and Methods

To support the theoretical arguments of the dissertation, I rely on two major qualitative

research methods. First, I conducted 41 in-depth interviews with Chinese government officials in Beijing, with Chinese delegates to the UN Mission, and with UN officials in New York, as well as with researchers in China's major Beijing think tanks and universities. Because of the quasi-statist feature of China's decision making regarding hard laws, interviews with Chinese government and UN officials are primary and direct evidence supporting the main arguments. However, as China's foreign policy decision making is usually opaque and government officials tend to withhold information during interviews, I also interviewed scholars and researchers to provide supplementary information.¹⁸

Second, I collected and analyzed a comprehensive set of documents regarding decision making on the three types of treaties, including statements and works by China's top leaders; documents of international organizations on the treaties and the UN conference records of the UNCLOS and the Rome Statute of the ICC; and books on those treaties written by Chinese scholars as well as articles published in China's academic journals.

Because public statements and works of the highest leadership are important ideological documents—representing not only the personal beliefs and preferences of individual leaders but also the collective wisdom of the CCP as a whole—I systemically study former President Jiang Zemin's discourses in the three volumes of *The Selected Works of Jiang Zemin* published in 2006 and use other leaders' works and statements as complementary materials. The *Selected Works* collects all major speeches and articles of Jiang Zemin during his presidency from 1992 to

¹⁸ Chinese government organizations represented among my interviewees include the Ministry of Foreign Affairs (MOFA), the Ministry of Commerce (MOFCOM), and the Permanent Mission of the People's Republic of China to the UN (UN Mission). Interviewees from the UN come from the Department of Economic and Social Affairs (DESA), Office of Legal Affairs (OLA), Office for the Coordination of Humanitarian Affairs (OCHA), Department of Political Affairs (DPA), Office of Disarmament Affairs (ODA), and the First Committee of Disarmament and International Security. Research institutes where my interviewees are affiliated include Peking University (Beida), Renmin University (Renda), Tsinghua University (Tsinghua), and Foreign Affairs College (FAC). Most interviewees from non-governmental institutes are leading and influential scholars in the fields of international

2002—when critical decisions regarding the three types of hard laws were made—and exhibits systemic views of the highest leadership on almost all important issues of state sovereignty, economic development, human rights, regime security, foreign policy, and so on. From those ideological documents, I try to draw inferences on how Chinese ruling elites perceive and conceptualize China's national interests, identity, and the legitimacy of sovereignty and other boundary-trespassing norms.

Although political leaders' works can shed some light on China's official line on sovereignty and other international norms in general, those materials do not directly address the three specific types of legalized treaties examined in this dissertation; therefore, I obtained relevant information from the UN conference records on the UNCLOS and the Rome Statute of the ICC. Both treaties were negotiated under the UN system; the UN conference records summarize debates and statements made by state delegates in each meeting. Those delegates made proposals, defended their governments' positions, and explained the reasons for supporting or opposing certain treaty provisions. Analyzing the conference records helped to identify China's official positions on the treaties and normative frames embedded in those positions during the periods of negotiation.

The final group of documents includes Chinese books and core academic journal articles directly addressing the three types of legalized treaties. The electronic database "China's Academic Journal" includes full texts of all major journal articles in China. I used the keywords "the BITs," "the UNCLOS," and "the ICC" to extract every article related to the three types of law published in China's academic journals. Among those materials, books and articles written by government officials or those affiliated with government branches were treated as more

business and economy, international law and human rights, international relations and foreign policy, and political science in general.

closely reflecting government positions than did other supplementary academic works.

In terms of scholars' works, since both the BIT and ICC cases focus on policymaking in the late 1990s and early 2000s, and academic elites did not seem to have direct input at that time, those two empirical chapters do not use academic works as a primary source of evidence but only as supplements to other types of evidence. However, when discussing the recent developments of these two types of treaties in the conclusion chapter, I document academic research on these topics since the late 1990s and discuss their potential impacts on government policies in the future. The UNCLOS case is slightly different from the BITs and the ICC. Scholars started to discuss the treaty also only after it was adopted in 1982; but since the focus of this chapter is China's ratification decisions in the later stage, scholars' voices might have had impact on government decision-making by that time. And because the Chinese government's final decision to ratify the UNCLOS was in line with most scholars' suggestions, the UNCLOS chapter gives academic works more weight than the BIT and the ICC chapters do.

Overall, given the quasi-statist feature of China's foreign policymaking regarding legalized international treaties, the empirical studies rely more on official sources, such as Chinese leaders' speeches and articles, interviews with and statements made by government officials, and UN documents, than on academic and other non-official sources as primary evidence to support the arguments of the thesis.

This dissertation is divided into five chapters that trace the behavioral patterns and causes of China's policymaking on signing and ratifying legalized treaties. Chapter 2 examines China's approaches to sovereignty and legalization in the non-core economic issue area and explores why China has been willing to make substantial changes in more than 40 new BITs since the late 1990s. It shows that the increased material benefits of protecting China's overseas investment

can offset some portions of the sovereignty costs and is the root cause of China's choice to sign legalized BITs; meanwhile, Chinese leaders' new historicist belief in the inevitability of economic globalization lowers the normative premiums of ceding control rights to a certain extent and plays a complementary role in driving the changes. Chapter 3 analyzes China's stance toward humanitarian and human rights issues and the reasons why China rejected the Rome Statute of the ICC in 1998, when it had already deeply integrated with the international society. This chapter shows that the ideational factor of Chinese leaders' strong Westphalian belief regarding core sovereignty means that they tended to pay more attention to the negative impacts of the human rights norm and the legalized Rome Statute on China's national and territorial unification than to the universal values of the norm and the widespread legitimacy of the treaty in the international society. As the Rome Statute does not allow any flexible arrangements for China to opt out its core sovereignty, China resolutely voted against it at the Rome Conference. Chapter 4 discusses the evolution of China's policies toward the UNCLOS from its early participation in the Third UN Convention on the Law of Sea in the 1970s to the final ratification of the treaty in 1996. Similarly to the BIT case, the material benefits of exploiting deep-seabed resources allowed China to change its position on the deep-seabed mining regime and partially offset the sovereignty costs of delegation; meanwhile, acceptance of the social legitimacy of UNCLOS after most developed countries had shown their support incrementally lowered the normative premiums of ceding non-core control rights and supplemented the material incentives in driving changes. However, as in the ICC case, the UNCLOS chapter demonstrates that Chinese leaders' belief in core sovereignty issue areas have rarely softened. Yet, differently from the highly boundary-trespassing and legalized Rome Statute, the UNCLOS incorporated an exclusion clause for states to exempt all territorial and military disputes from the treaty's

jurisdiction—significantly lowering the sovereignty costs of the treaty and removing the biggest obstacle for China to sign and ratify it. Based on the theoretical discussion on sovereignty and empirical studies on China’s approaches to legalized dispute resolution, Chapter 5 provides a conclusion that places the findings within a broader analytical context.

Chapter Two

Overseas Investment and Economic Globalization: China's Changing Policies on Legalized Bilateral Investment Treaties

The last two decades have seen a surge in Bilateral Investment Treaties (BITs) around the world; BITs have become the most important international legal mechanism governing foreign direct investment (FDI). These treaties represent new trends in the liberalization of FDI and the legalization of dispute resolution in international politics: treaty provisions have become more precise, binding, and enforceable, and states have been willing to delegate investment disputes to international arbitration authorities, especially the International Centre for the Settlement of Investment Disputes (ICSID), a permanent legal institution for solving disputes between host states and private investors (Allee and Peinhardt 2011; 2012).

Since its first treaty with Sweden in 1982, China has signed BITs with more than 110 countries, second only to Germany.¹⁹ Yet, most BITs signed in the 1980s and the 1990s granted foreign investors solely most-favored-nation (MFN) treatment, and delegated only one type of disputes to the ICSID or *ad hoc* arbitration. The contents of China's BITs have changed notably since the late 1990s, offering foreign investors more substantial protection than did earlier treaties. China has become ever more willing to provide national in addition to MFN treatment to foreign investors, and to delegate all types of investment disputes between state and private actors to the ICSID.

Two main forces contribute to the evolution of China's BIT practices in the most recent decade. One is the initiation of China's new state-led developmental strategy of "going out" [*zou*

¹⁹ China has renegotiated nearly a dozen BITs since 2003. The total number of 110 refers to the countries that signed BITs with China, not the total number of China's BITs.

chugu]: the government has actively promoted China's overseas investment in order to strengthen the competitiveness of its firms and sustain its long-term economic growth. The other force is the formation of a new boundary-trespassing belief among Chinese leaders that economic globalization is an inevitable trend independent of men's view, and that China should "keep up with the times" so as to thrive in fierce international competition. The increased material benefits of protecting China's own overseas investment partially offset the high sovereignty costs of more liberal and legalized BITs; the historicist belief in the inevitability of globalization increases the social legitimacy of the new treaties and gradually lowers the normative premiums for China to deviate from the Westphalian norm in economic issue areas.

Nevertheless, these factors cannot completely replace the traditional sovereignty norm in shaping China's BIT policies. In order to lower the sovereignty costs associated with more liberal and legalized BITs, China has made reservations to several boundary-trespassing treaty provisions. It does not grant foreign investors unconditional national treatment, and it maintains the right to require investors to use domestic administrative reviews before submitting disputes to international arbitration. Therefore, although China has closely followed the international trend of liberalizing FDI, it has been cautious about loosening state control even in non-core sovereignty issue areas and tried to maintain a delicate balance between its dual roles as a capital exporting and importing state.

This chapter is organized as follows. The first section describes the trends of liberalization of FDI and the legalization of BITs at the global level. The second part provides an overview of the evolution of China's BIT practices from the early 1980s to the current stage. It then discusses in the third section how the changes in China's material interests and the initiation of the "going out" strategy influence decision makers' benefit-cost calculation of the new BITs. The fourth

section focuses on how Chinese leaders' new boundary-trespassing belief in the inevitability of economic globalization changes their perceptions on state sovereignty and influences their decision making on major foreign economic policies. Section Five analyzes the impacts of the Westphalian norm in economic issue areas and examines China's reservations to the major boundary-trespassing treaty provisions of its new BITs. The chapter then concludes with the sixth section.

1. The BITs and the Liberalization of Foreign Investment

BITs are bilateral international agreements establishing the terms and conditions for private investment by the individuals and companies of one country in the jurisdiction of another. Most treaties are signed between a developed and a developing country, or between two developing states. As the international society has not been able to establish a global-level multilateral regime to govern foreign investments, BITs have become the most important international legal instruments in facilitating and governing foreign direct investment (FDI) in recent decades (Elkins, Guzman, and Simmons 2006: 812; Yu, J. 2007: 43). The contents of BITs usually include the most favored nation (MFN) and national treatment of foreign investors, compensation in the event of expropriation and nationalization, free currency transfer from the host to the home country, and DSM for solving disputes between contracting states as well as between private investors and host states (Dolzer and Stevens 1995; UNCTAD 2007).

BITs have proliferated and become more legalized around the world only in the recent two or three decades. For a long time after the post-WWII independence of the third world, international practices regarding FDI and BITs had been more sensitive to state sovereignty as developing countries strove to build a "new international economic order" (NIEO) and tried to put foreign investment under states' control. Alongside the rising trend of nationalizing foreign

investment across the third world in the 1960s, developing countries advocated the pro-sovereignty Calvo Doctrine, which holds that jurisdiction in international investment disputes lies with the host country and that foreign investors have to exhaust local remedies before resorting to the protection and intervention of the home state.²⁰ This doctrine challenged the pro-investment Hull Rule supported by developed countries, which requires the host state to provide “prompt, adequate and effective payment” in cases of nationalization and expropriation.²¹ The collective efforts of developing countries in this period enabled the UN General Assembly to adopt a series of Resolutions on Permanent Sovereignty over Natural Resources that confirmed the Calvo Doctrine and prioritized state sovereignty over investors’ rights in the 1960s and 70s. For example, Resolution 1803 in 1962 allowed expropriation of foreign investment by host states in the name of the national and public interest with merely “appropriate” compensation, and Resolution 3171 in 1973 stated that in the event of nationalization, “each State is entitled to determine the amount of possible compensation and the mode of payment” (UN 1962: 16; 1973: 52).

Moreover, the 1965 multilateral ICSID Convention (i.e. the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also known as the Washington Convention), which set up the ICSID as a permanent arbitration institution, is essentially a soft law allowing states to maintain great discretion and policy autonomy. Three major aspects reflect the flexibility and non-binding features of the Convention. First, the treaty’s preamble says that ratification, acceptance, or approval of the Convention does not mean that contracting states have the obligation to submit disputes to the ICSID, and that any specific dispute requires a state’s consent before it can be submitted to the ICSID. Second, the

²⁰ For reviews of the “Calvo Doctrine”, see Denise Manning-Cabrol 1995; Yackee 2007; Shan 2007.

²¹ For a discussion on the “Hull Rule”, see Guzman 1998.

Convention grants states the rights to decide at any time which types of disputes it would or would not submit to the ICSID for arbitration. And third, Article 26 of the treaty confirms the Calvo Doctrine and stipulates that “a Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration” (The ICSID Convention 1965). Given that developing countries in general held strong sovereignty beliefs and retained a deep distrust of FDI and MNCs, they were not enthusiastic about signing BITs and accepting the ICSID’s jurisdiction before the 1980s.

However, the third world’s attitudes and approaches to FDI and BITs have changed greatly in recent decades, as most developing countries have embraced neo-liberal developmental ideas and undertaken pro-market economic reforms since the 1980s. The profusion and legalization of BITs is in accordance with a rising trend of liberalization of foreign investment around the world (Elkins et al 2006; UNCTAD 2003; 2006; 2007). FDI has been widely accepted as one of the most effective means to boost the economic growth of a host state; ever more developing countries have loosened their control of FDI and signed more liberal and legalized BITs to facilitate capital inflows.

BITs can function as a legal means for capital-importing countries to make credible commitments and attract FDI. Unlike industrialized countries with well-established domestic legal institutions, many developing countries lack the sound institutional environments that can provide adequate protection for FDI. Foreign investors usually face great uncertainties and risks when investing in those countries. In order to effectively attract FDI, developing countries have to solve the commitment problem and send credible signals to potential investors. As BITs set up a set of legal obligations and impose sovereignty costs for host states, capital-scarce states can use the treaties to tie their hands and signal their commitment to protecting and liberalizing

foreign investments (Ginsburg 2005; Buthe and Milner 2009; Allee and Peinhardt 2011).

Because of the increasing competition pressure for developing countries to attract FDI, they have been willing to bear higher sovereignty costs and grant foreign investors more substantive rights in hard BITs. The zeal of the third world countries for establishing a NIEO has been replaced by their goal of following the trend of economic globalization and integrating with the global market (Vandeveld 1998; Elkins, Guzman, and Simmons 2006). In response to the rising demands of developing countries for FDI, developed countries have actively promoted more liberal and legalized BITs and significantly raised the standards (i.e. the sovereignty costs) of signing the treaties. The importance of the pro-sovereignty Calvo Doctrine has gradually decreased vis-à-vis the pro-investment Hull Rules in determining the contents of BITs in recent decades.

The United States has played an especially important role in strengthening the trend of liberalization and legalization of the treaties. Although initiating BIT practices relatively late in the 1980s, the United States has since then taken the lead to liberalize FDI and driven up the standards of the BITs.²² Unlike many European countries that focus on investment protection and are more willing to accommodate the sovereignty concerns of capital-importing states, the United States has always emphasized liberalization in addition to the protection of investment and rarely lowered its standards when negotiating the treaties (Reading 1992; Salacuse and Sullivan 2005: 73; Elkins et al 2006: 815). Although most BITs signed between developed and developing countries since the late 1980s are hard laws in nature, the American type represents a higher degree of liberalization and legalization, and imposes much higher sovereignty costs on host countries than do the treaties promoted by its European counterparts—also known as the

²² For discussions on the US role and its BITs, see Gann 1985; Vandeveld 1993.

German type.²³

The two most important treaty clauses determining the degree of liberalization and legalization of BITs are the national treatment clause and the dispute resolution mechanism.²⁴ The national treatment clause represents the biggest difference between the American and German types of BITs. The German type is more conservative, requiring national treatment only in the post-establishment phase. That means that once foreign investors are allowed to set up business in the host state, they should be treated the same as domestic investors; yet the host state still has the right to review and disapprove a potential investment in the first place. In contrast, the American type is more intrusive to state sovereignty, as it requires national treatment to foreign capitals at both the pre- and post-establishment stages. Foreign investors should be able to enter the market of the host state and set up business freely without prior approval, except for certain special industries concerning national security and critical public interests. Thus, the American type of national treatment not only strengthens investment protection, but further liberalizes FDI accession.

In terms of the DSM clause, legalized BITs require states to accept international arbitration, especially the ICSID's jurisdiction, over most investment-related disputes between the host state and private foreign investors. Granting such investors direct access to international arbitration strengthens the enforceability of the treaties and increases the bargaining power of the private actor vis-à-vis the host state. Even if a dispute does not eventually go to an arbitration tribunal for settlement, investors can use the delegation mechanism as a credible threat to force the host

²³ German and America's BITs can be downloaded from the UNCTAD website:
http://www.unctadxi.org/templates/DocSearch____779.aspx. Accessed: 07/23/2013.

America's BITs that are currently in force can also be obtained from the Trade Compliance Center website:
http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp. Accessed: 07/23/2013.

²⁴ In addition to the national treatment and DSM clauses, the liberalization tendency and the rising sovereignty costs of hard BITs are reflected in the changes in several other treaty provisions, such as the definitions of "investment", "investor", and "expropriation", compensation for expropriation, and the restriction of "performance requirements".

state to better comply with treaty provisions. The most legalized treaties require states to accept the ICSID's jurisdiction *unconditionally* without imposing the "exhaustion of local remedy" restrictions; while a less legalized DSM allows host states to require that investors exhaust domestic legal or administrative remedies before resorting to international arbitration. Although the United States and Western European countries all advocate a highly legalized DSM, European countries are more flexible than the US, being willing to sign treaties with some countries that insist on the "exhaustion of local remedy" condition in certain circumstances.

Although signing more liberal and legalized BITs has become a trend and developing countries have exhibited great enthusiasm for BITs since the late 1980s, the sovereignty costs are actually disproportionately distributed between capital-importing and -exporting states. Unless two states invest relatively equally in each other's territories, the major capital-importing state often bears the majority of sovereignty costs, while a capital-exporting country and its private investors mainly enjoy the benefits of legalized BITs.

Liberal and legalized BITs greatly weaken the policy autonomy of developing countries (Guzman 1998; Neumayer and Spess 2005; Yackee 2007). If a treaty adopts a looser definition of expropriation and imposes fewer restrictions for foreign investors to submit disputes to the ICSID, any domestic policy or legal changes that have impacts on foreign investment can trigger arbitration (Elkins, Guzman, and Simmons 2006: 825). For example, when the Argentine government took emergency measures and removed the one-to-one peg with the US Dollar during the 2001 financial crisis, more than thirty multinational companies filed investment disputes with the ICSID. Some analysts estimate that the total value of the claims made by foreign investors could reach 80 billion USD (Wong 2005; Burke-White 2008: 204). The high sovereignty costs the Argentine government incurs when dealing with those cases have led

Argentina to reverse its previous liberal stance on FDI and BITs. Moreover, Argentina's experiences as well as arbitration charges and decisions against other developing countries in the past decade may have sent some warning signals to third world countries, dampening their enthusiasm for signing BITs in recent years.²⁵

Because of the potentially high sovereignty costs of hard BITs, the UNCTAD has suggested that developing countries should maintain enough policy space and enable governments to flexibly use necessary economic policies within the legal framework of the treaties (UNCTAD 2003: xvii). As the benefits of highly legalized BITs may not outweigh the potential sovereignty costs of losing economic control rights, the biggest challenge for developing countries when negotiating BITs is to balance between the degree of legalization of the treaties and the policy autonomy of the state, so that they can effectively attract FDI without sacrificing state sovereignty unnecessarily.

2. The Evolution of China's Positions on BITs²⁶

China's BIT practices can be divided into three stages. In the 1980s, China signed BITs mainly with Western developed and newly industrialized Asian countries. All the treaties in the first stage were soft laws that did not include the national treatment clause or recognize the jurisdiction of the ICSID. Following the end of the Cold War, China signed the second wave of BITs with newly independent post-Soviet states as well as many developing countries in the Middle East, Latin America, and Africa. As China became a state party to the ICSID Convention and accepted the jurisdiction of the ICSID in the early 1990s, some BITs signed in this period

²⁵ According to the 2012 UNCTAD *World Investment Report*, the BITs have lost their burgeoning momentum since the late 2000s, partly due to the rise of regionalized treaty making and partly due to the controversial and politically sensitive investor-state arbitrations (UNCTAD 2012: 84).

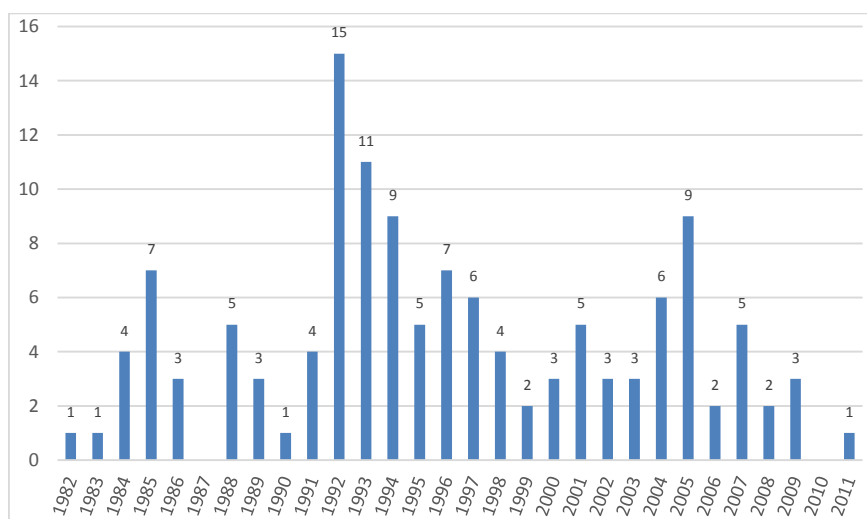
²⁶ The analysis of this section is based on the BITs China signed from 1982 to 2011. The full texts of those treaties can be obtained from the following three websites:

UNCTAD: http://www.unctadxi.org/templates/DocSearch___779.aspx. Accessed: 07/23/2013.

MOFCOM: <http://tfs.mofcom.gov.cn/article/Noacategory/201111/20111107819474.shtml>; Accessed: 07/23/2013.

agreed to delegate limited disputes to the ICSID, although most treaties still did not grant national treatment to foreign investors. The third stage of China's BIT practices is now underway: China has substantively revised the contents of its BITs, accepting both the national treatment clause and the ICSID's jurisdiction over all types of investment disputes, albeit with some reservations. It has signed more legalized BITs with many developing countries that had not previously signed treaties with China; in the meantime, it has also renegotiated with nearly a dozen developed or OECD states and replaced the previous soft treaties with hard ones since 2001

Figure 2.1: The Number of BITs China Signed (1982-2011)



Source: UNCTAD: http://www.unctadxi.org/templates/DocSearch_779.aspx
MOFCOM: <http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml>

The evolution of China's BITs epitomizes the path of its integration with the global economy in the past three decades. In the first decade of this process, China was a capital-scarce developing country and urgently needed FDI to facilitate its economic development. In order to improve its investment environment and strengthen the protection of foreign investment, China

signed the first wave of BITs with major capital-exporting countries, i.e., Western developed and newly industrialized Asian states, in the 1980s. Nevertheless, because China was still at the beginning of its economic reform and held strong sovereignty beliefs even in noncore economic issue areas, the normative premiums of boundary-trespassing treaty obligations, such as national treatment and delegating disputes with private investors, were prohibitively high.

As a result, those early BITs have more symbolic than substantive meaning, as most treaty provisions were very vague and lacked binding effects on China. None of those treaties incorporated the national treatment clause, and the best treatment China could offer to foreign investors was MFN. In terms of compulsory DSM, the first BIT signed with Sweden in 1982 did not even include the clause of dispute resolution between the host state and foreign investors. Although the subsequent treaties with other industrialized countries included the DSM with private investors in treaty protocols, only one type of dispute regarding the compensation amount of expropriation or nationalization could be submitted to an *ad hoc* arbitration tribunal. The ICSID was not acceptable to China as a possible choice for dispute resolution, because China was not a state party to the ICSID Convention at that time.²⁷ Using *ad hoc* arbitration to solve disputes is more flexible and imposes fewer sovereignty costs than resorting to a permanent independent legal authority, as each party to the dispute can appoint one arbitrator of its own together with a third arbitrator from a third party, to form an *ad hoc* tribunal.

China's acceptance of the ICSID Convention in the early 1990s signifies the starting point of the second stage of its BIT practices. Chinese elites became aware of the Convention and started

²⁷ In the later exchange letters between China and other developed countries, such as Germany, France, Singapore, Britain, Switzerland, and New Zealand, China agreed that when it became the member of the ICSID Convention it would consider renegotiating the treaties with regard to the possibility of submitting investment disputes to the ICSID. The main body of the treaty signed with Australia in 1988 conveys a similar message: "In the event that both the People's Republic of China and Australia become party to the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, a dispute may be submitted to the International Centre for

to consider signing the treaty in the late 1980s, as most Western developed countries when negotiating BITs with China insisted that it join the Convention and accept the jurisdiction of the ICSID (see for example, Chen, Z. 1986; Chen, J. and Zeng 1987: 23; Lu, Y. 1987; Duan, J. 1987: 38; Zhou, C. 1987: 42). The decision making regarding the ICSID Convention was not a particularly difficult one, mainly because the Convention allows states to maintain a great degree of policy autonomy and accept only limited ICSID jurisdiction. The soft law nature of the Convention significantly lowered the sovereignty costs for China to participate even in the early period of its economic reform.

In fact, China supported merely the “lower bound” of treaty obligations: upon ratification in 1992, it made a reservation that it would consider submitting to the jurisdiction of the ICSID only disputes over *the amount of compensation* resulting from expropriation and nationalization; any other types of disputes must get government consent on a case-by-case basis before submitting to the ICSID. During most of the 1990s, China maintained this stance on state sovereignty and the ICSID’s jurisdiction when signing BITs. It agreed to delegate disputes over compensation amounts in several subsequent treaties signed with developing countries.

This incremental change indicated that Chinese elites’ sovereignty beliefs had slightly softened in the early and mid-1990s. They perceived the disputes over compensation amount as having mainly material meaning and therefore lacking strong normative connotation. Nevertheless, the normative premiums of ceding control rights over other types of economic disputes were still very high. For example, Chinese elites believed that sovereign states had the inherent right to nationalize foreign investment in their own territories and that such rights *per se* could not be questioned by international legal authority; therefore, they refused to delegate

the Settlement of Investment Disputes for resolution in accordance with the terms on which the Contracting Party which has admitted the investment is a party to the Convention”.

disputes regarding the legitimacy of states' expropriation and nationalization to the ICSID.

The third stage of China's BIT policies started with the first legalized BIT, signed with the Latin American island state of Barbados in 1998. Although this treaty did not include the national treatment clause and was the only one in the 1990s that allowed private investors to submit "any investment related disputes" to the ICSID, it opened the door for China to accept more liberal and legalized treaty provisions in the following decade. Since 2001, China has systematically made more substantial boundary-trespassing commitments in its new BITs. Most treaties signed in the last decade have promised to grant national treatment to foreign investors in the post-establishment stage and also incorporated the ICSID as a formal arbitration institution to deal with any investment-related disputes between foreign investors and the host state. In addition to the national treatment and the DSM clauses, China has accepted more precise and broader definitions of "investment" and "expropriation," and greatly loosened the restrictions for investors to transfer returns from host to home states (Chen, A. 2007; Cai, C. 2007; Wang, 2007)

In the meantime, China has actively negotiated and signed Free Trade Area Agreements (FTAs) with countries in various regions since 2000. The formats and contents of the FTA Investment Agreements with some countries, such as New Zealand, the ASEAN States, and Peru, closely resemble the language of its new BITs. Those preferential FTA Investment Agreements have thus replaced the old soft BITs and served the same function as the new legalized ones in governing bilateral investment relations between China and relevant states.

Although China's BITs in the last decade have become much more liberal and legalized than those signed in the 1980s and the 1990s, China still tries to lower the sovereignty costs of its new BITs by making reservations to several boundary-trespassing treaty provisions, especially the national treatment and the DSM clauses. It does not grant private investors unconditional

national treatment even in the post-establishment stage, and it maintains the right to require investors to exhaust domestic administrative remedies before resorting to international arbitration. As Table 2.1 shows, although China's new treaty template is based on the German-type legalized BIT, it imposes lower sovereignty costs and achieves lower degrees of liberalization and legalization than the unconditional German and American types do.

Table 2.1: Sovereignty Costs and Legalization Degrees of BITs

	Soft BITs without delegation	Soft BITs with limited delegation	German-type hard BITs with Reservation	German-type hard BITs without Reservation	American- type hard BITs
Sovereignty Costs/ Legalization Degrees	Lowest	Low	Medium High	High	Highest
Example	China's BITs in the 1980s	China's BITs in the 1990s	China's BITs after 2000	BIT between Germany and Bolivia in 1987	BIT between US and Uruguay in 2005
Treatment	MFN only (no national treatment)	MFN only (no national treatment)	Conditional post- establishment national	Unconditional post- establishment national	Unconditional pre- and post- establishment national
Delegation	No delegation or expropriation amount to <i>ad hoc</i> arbitration	Only expropriation amount to the ICSID	All types of disputes to the ICSID with reservation	All types of disputes to the ICSID without reservation	All types of disputes to the ICSID without reservation

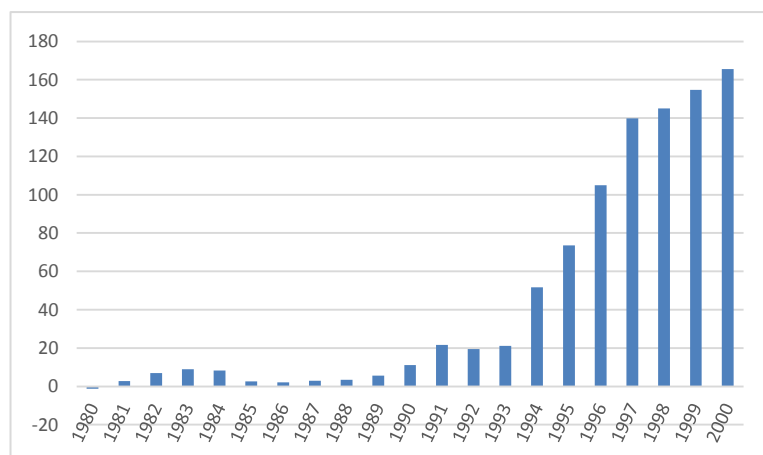
3. China's "Going Out" Strategy and the New Material Benefits of Legalized BITs

The most direct causes of the liberalization and legalization of China's BITs are China's new material interest in promoting its overseas investment and its new developmental strategy of "going out" [*zou chuqu*], as its foreign exchange reserves accumulate and its material power increases rapidly. When China had neither the intention nor the capabilities to invest overseas on

a large scale in the early stages of its economic reform, delegating disputes to the ICSID and granting foreign investors national treatment would mainly impose high sovereignty costs without bringing China any significant gains. Nevertheless, as China becomes a capital-surplus economy with the desire to invest in other countries, decision makers realize that legalized BITs can provide better protection for China's own investments and function as important legal instruments to facilitate the "going out" strategy. Although the material dimension of sovereignty costs from hard BITs—captured by the inherent values of the control rights being ceded—will inevitably rise, the increased material benefits of more liberal and legalized treaty provisions can offset some portions of the costs and directly lead to the change of China's BIT policies in the recent decade.

The most important structural force that contributes to the evolution of China's material interests and enables Chinese leaders to initiate the "going out" strategy is the rapid increase in its foreign exchange reserves. After experiencing nearly two decades of export-led economic growth in the early stage of the "reform and opening up," China has accumulated a large trove of foreign exchange reserves, evolving from a poor, capital-scarce state to a major capital-exporting economy in the world. As Figure 2.2 and 2.3 show, China's foreign exchange reserves reached 100 billion USD for the first time in 1996 and have since then maintained a strong momentum. The large amount of capital-surplus provides a solid financial foundation for Chinese firms to invest overseas and actively participate in market competition at the global level.

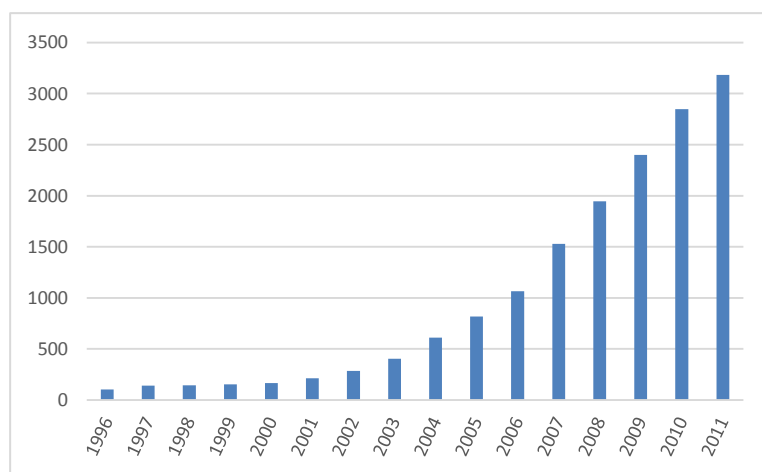
Figure 2.2: China's Foreign Exchange Reserves from 1980-2000 (billion USD)



Source: China's Administration of Foreign Exchange:

http://www.safe.gov.cn/wps/portal/!ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gPZxdnX293QwMLE09nA09Pr0BXLy8PQyNPI_2CbEdFAKLWUno!/?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/safe_web_store/safe_web/tjsj/node_tjsj_whcb/node_tjsj_whcbs2_store/799fcb004818128e8fc7df84909d05cd

Figure 2.3: China's Foreign Exchange Reserves from 1996-2011 (billion USD)



Source: China's Administration of Foreign Exchange:

http://www.safe.gov.cn/wps/portal/!ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gPZxdnX293QwMLE09nA09Pr0BXLy8PQyNPI_2CbEdFAKLWUno!/?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/safe_web_store/safe_web/tjsj/node_tjsj_whcb/node_tjsj_whcbs2_store/799fcb004818128e8fc7df84909d05cd

Besides the large amount of foreign exchange reserves, the rapid growth of China's overall economy and material power has greatly boosted Chinese leaders' confidence in promoting the "going out" strategy and strengthening China's international competitiveness and global influence. As stated in an article by Shi Guangshen, former head of the Ministry of Commerce (MOFCOM—the government agency in charge of negotiating and signing BITs),²⁸

The rapid and continuous development of our national economy and the fruitful results gained from more than two decades of the "bringing in" practices²⁹ have provided important material foundations and experiences for us to implement the "going out" strategy. Nowadays, the scales of our economy, foreign trade, FDI, and foreign exchange reserves have reached the front rank of the world; several industries and products have gained significant comparative advantages by participating in global market competition and we have mastered many advanced and world-leading technologies; therefore, our capabilities to invest overseas have increased steadily (Shi 2002: 36).

Chinese leaders began to deliberate the "going out" strategy as early as the mid and late 1990s. After a trip to Africa in 1996, former President Jiang Zemin first raised the possibility of policies to promote China's overseas investment in Africa (Jiang 2006 vol. 2: 94). In a meeting with government officials in charge of foreign investment in 1997, Jiang stated that China needed not only to attract foreign capital, but also to encourage domestic firms to set up businesses and utilize the markets and resources in other countries. Moreover, Chinese firms should not focus solely on developed countries in West Europe and North America, but also need to pay attention to the markets in developing countries (2006 vol. 2: 92).

The "going out" strategy was an important part of China's grand strategy. First publicly announced by President Jiang Zemin in the Third Session of the Ninth National Congress of the Chinese Communist Party (CCP) in March 2000, it was later written into the 10th, 11th, and 12th

²⁸ Minister Shi Guangsheng's tenure in MOFCOM from 1998 to 2003 was the critical transformation period of China's BITs: China's first legalized BIT with Barbados was signed in 1998, and the first renegotiated one with the Netherlands was signed in 2001.

²⁹ This refers to China's policies on attracting FDI.

Five-Year Plans for National Economic and Social Development³⁰ in 2001, 2006, and 2011 respectively. This new developmental strategy intended to achieve two major strategic aims: to strengthen the competitiveness of large state-owned enterprises (SOEs), and to facilitate the sustainable growth of China's economy in the long run. As Jiang said,

‘Bringing in’ [*yin jinlai*] and ‘going out’ [*zou chuqu*], are two closely related and indispensable parts of the fundamental national policy of ‘reform and opening-up’. This guideline must be set up. *Nowadays, international competition has been so keen that we have to do this in order to invigorate our state-owned-enterprises and to sustain the long-term economic development.* We need to speed up our research, policy-making, and policy implementation, so as to have significant achievements in two or three years. The key point is to guide and support a group of large and middle sized SOEs to ‘go out’, setting up the tone of overseas investment and exploring the potential global market. *This is a grand strategy—an important strategy of ‘reform and opening-up’ as well as an economic developmental strategy* (Jiang 2006 vol. 2: 92; Italics mine).

Although Chinese leaders are enthusiastic about promoting China's overseas investment, the implementation of the new national developmental strategy is not without obstacles. Chinese policymakers especially worry about the high risks and uncertainties their firms and investors encounter in developing countries. Because many of those countries lack effective legal and administrative institutions, many potential Chinese firms and individuals have been deterred from conducting business there. The lack of institutional protection in the third world has become the biggest barrier for China to implement its “going out” strategy. For example, former Premier Zhu Rongji explicitly expressed this concern in response to a reporter's question about the potential difficulties Chinese firms faced in the process of “going out” in 2002:

The problem is that investment environment in some developing countries is not good enough. They do not have investment-related laws and many things do not have formal rules to follow. *Our businessmen often shake heads when talking about these issue and do not want to go there. If he does not want to go, even if I use a whip to beat him from behind, it will not work.* There should be some institutions and we need to help

³⁰ The Five-Year Plans are a series of national developmental initiatives, which periodically set up the goals and directions and lay out concrete plans for China's economic development. The first Five-Year Plan was initiated in 1953, and the most current 12th one was passed in 2011 (People's Net: <http://dangshi.people.com.cn/GB/151935/204121/index.html>).

developing and friendly countries to improve their investment laws and regulations, so that we can ‘go out’ (Zhu 2009: 429; italics mine).

In order to implement the “going out” strategy and lower the risks for Chinese firms to invest in developing countries, the MOFCOM has changed its long time practices of signing only soft treaties and begun to advocate more liberal and legalized BITs since the late 1990s. Although the sovereignty costs of hard BITs will increase significantly, decision makers seem confident that the expected benefits can offset large portions of the costs. The potentially high sovereignty costs originate mainly from legalized BITs China has renegotiated and signed with developed countries. Because China is still a capital-importing state vis-à-vis developed countries, accepting more boundary-trespassing obligations in new BITs will constrain the policy autonomy of the state and increase the risks that the Chinese government will be brought to international arbitration by private foreign investors.

Nevertheless, protecting China’s overseas investments in developing countries has become an ever more important aim for Chinese policymakers. They expect to make use of legalized BITs to bind the governments of capital-importing developing countries and lower the risks for Chinese investments overseas. For example, Shang Ming, former Director of the Department of Treaties and Laws of the MOFCOM³¹, explains in a journal article the main purpose for China to sign legalized BITs as follows:

Nowadays, our overseas investments mainly concentrate in developing countries. The legal environments of those countries vary significantly and the environments for foreign investments have not yet been perfect. By signing BITs, we can make sure that host countries’ obligations of protecting our investors and their commitments to our investors have international legal effects. BITs can, to a certain degree, reduce the possibility that our overseas investments are harmed or cannot get adequate protections due to the unsound domestic legislations of host states, and thus increase the predictability for our investors to invest in those countries (Shang 2005: 32).

³¹ The MOFCOM’s Department of Treaties and Laws has been directly in charge of negotiating and signing BITs since the early 1980s.

Shang Ming further emphasizes that in the process of “going out”, Chinese firms should fully understand and make use of the treaty provisions of the BITs; they should learn to use legal methods to solve disputes with host states and better protect their legitimate rights (Shang 2005: 32).

The evolution of China’s material and strategic interests has enabled Chinese leaders to think not only as a capital-importing, but also as a capital-exporting state. Although soft BITs allow China to maintain more policy autonomy as a host state, they could not provide adequate protection for its increasing investment in the third world. When negotiating and signing BITs, policymakers have balanced China’s dual roles as both a capital-importer and -exporter, believing that the increased material benefits of protecting China’s investments in developing countries can partially offset the rising sovereignty costs of signing legalized BITs with developed countries. As Ma Yuchi, a government official in the Department of Treaties and Laws of the MOFCOM, wrote in a book chapter,

China has become an important capital exporting state because of the implementation of the ‘going out’ strategy. Most of our investments go to developing countries... China used to think from the perspective of a host state, and tended to have reservations towards investment treatment and dispute resolutions... Since these reservations will be similarly applied to China’s own overseas investments (mainly in developing countries), if we still holds traditional stance when negotiating BITs with potential host states, it may not be good for the protection of our interests. We should have new thinking about how to protect overseas investment through international investment treaties and law (Ma 2007: 267-268, Italics mine).

Therefore, if China’s “going-out” aim is taken as given, legalized BITs are effective means to achieve the end, and thus the material benefits of accepting more liberal and legalized treaty provisions increase. However, China’s signing and renegotiating of new BITs should not be viewed solely from this static perspective, as the policy of promoting China’s overseas investment does not result only from the rise of China’s material power, but also from a

profound change in Chinese leaders' beliefs. Once decision makers accept the social legitimacy of economic globalization, the sense of necessity to follow the trend itself dwarfs the costs of participation: it not only makes Chinese leaders actively promote China's overseas investments, but also lowers the normative premiums of loosening state control over all types of economic activities within its territory, including inward FDI.

4. Economic Globalization and Reduced Normative Premiums of Legalized BITs

Besides material interests, the decrease in the normative premiums of ceding economic control rights over time made the overall sovereignty costs of legalized BITs more bearable in the late 1990s than before. The weakening of the Westphalian norm in economic issue areas is mainly due to the strengthening of a boundary-trespassing belief that economic globalization is an inevitable trend independent of men's will, and that following the trend is a necessity rather than a choice. Such a historicist belief has great impact on decision makers' perceptions of the benefits and costs of participating in globalization and market competition, and thus leads to a comprehensive set of foreign economic policies to further internationalize and liberalize China's economy in both trade and investment areas.

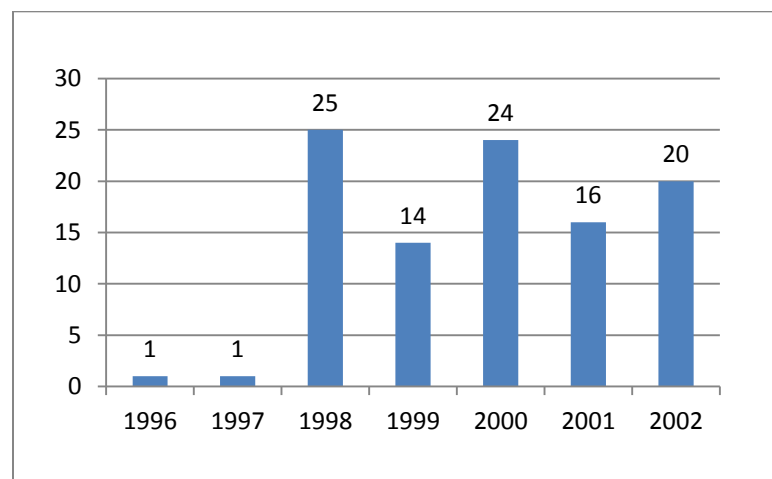
4.1 The Social Legitimacy of Economic Globalization

A historicist belief in the inevitability of a norm or trend generates a strong sense of social legitimacy, as states derive historicist and determinist meanings of a social trend from rapid and forceful changes in their external environments and from the common practices of most states in the international society. Since the late 1970s, when China started the "reform and opening" process, Chinese elites' stances towards economic sovereignty have been softened and their beliefs in the market force and economic interdependence strengthened step by step; but it was not until the late 1990s that the top leaders started to accept the social legitimacy of economic

globalization.

The concept of globalization began to take off in Chinese top leaders' discourses in 1998. As Figure 2.4 shows, in the three volumes of *Selected Works of Jiang Zemin*, “globalization” appears only once in Jiang Zemin’s selected speeches, in 1996 and 1997 respectively—when Chinese leaders started to pick up the term and consider the implications of the trend on China. However, the concept jumped to 25 times in Jiang’s 1998 works, and maintained an average frequency of about 20 times per year from 1998 to 2002 during his second term as president. The peak of the concept of “globalization” in Jiang Zemin’s speeches coincides with the critical time that China finalized its WTO negotiations, promoted the “going out” strategy, and started to sign legalized BITs.

Figure 2.4: Number of Times “Globalization” Appears in *Selected Works of Jiang Zemin*



Jiang Zemin comprehensively elaborated the meaning of economic globalization for the first time in 1998, in the article titled “The Current International Situation and Our Diplomatic Works”, which references the concept 21 times. Jiang recognized the social legitimacy and boundary-trespassing features of the global market, using a vivid Chinese idiom, “*ni zhong you wo, wo zhong you ni*”—translated as, “I integrate with you and you integrate with me”—to

characterize globalization (Jiang 2006 vol. 2: 198). As he said, “the most basic features of economic globalization are the free mobility and allocation of commodity, technology, information, and especially capital at the global level, as well as the consequent complex phenomenon of ‘I integrating with you and you integrating with me’ [*ni zhong you wo, wo zhong you ni*] among every developed and developing country”. (Jiang 2006, vol. 2: 201). The idiom clearly demonstrates Chinese top leaders’ recognition that the global market had connected every country and obscured the economic boundaries between nation states.

The most important reason for Chinese leaders to accept the legitimacy of the boundary-trespassing power and the integrating effects of the global market is their belief that economic globalization is an “objective trend [*keguan qushi*] of the world economic development” and “reflects the development of productive forces and technologies of the society” (Jiang 2006, vol. 2: 201, 199). Because Marxism, the orthodox ideology in China, posits materialist “productive forces” and technology as the ultimate driving forces of history and as the “economic foundation” of all types of “superstructures” (such as social relations, norms and cultures), a social trend that is driven by the development of productive forces has innate legitimacy and represents the correct direction of history.

Jiang Zemin especially emphasizes that “the emergence of the trend of economic globalization is not accidental” (Jiang 2006 vol. 2: 198). He derives the inevitability of globalization from four widespread and interrelated boundary-trespassing forces of the market economy: increasing cooperation and competition among states in the global market for the purpose of economic development; the new technological revolution; the liberalization of trade, investment, and finance; and the rise of transnational corporations (Jiang 2006 vol. 2: 198; italics mine). Jiang elaborated the four features of the globalization as follows:

First, the international situation in general becomes more relaxed. Every state takes economic development as the top priority, and actively enters into the international market; the coordination and competition among states has been increasingly strengthened. Second, the new technological revolution, represented by information and biological technologies, has greatly stimulated economic development in the world and strengthened the economic ties among nations. Third, the liberalization of trade and investment has accelerated at both global and regional levels. Especially in international financial market, the innovation of financial instruments has been endless and the scale and speed of financial exchange has been unprecedented.... And fourth, transnational corporations have ceaselessly enlarged their scales and become the major vehicles of economic globalization (Jiang 2006, vol. 2: 198).

Accepting the legitimacy of economic globalization means that Chinese top leaders have recognized that the market, rather than the state, can better reflect the “objective demands” of productive forces, and that the free mobility and allocation of resources beyond national boundaries is the innate demand of a market economy. Although a state has the authority and autonomy to make economic policies and regulate economic activities within its own territory, its intervention should follow the rules of the market economy. If a state’s economic control rights are weakened by the market forces that reflect the “objective” development of productive forces, it represents a historical necessity. Therefore, when facing the inevitable trend of economic globalization, state sovereignty is not absolute, and market forces may triumph over the Westphalian norm.

The sense of necessity to follow the inevitable trend not only reduces the normative premiums of ceding economic control rights, but also allows Chinese leaders to develop a dynamic and dialectic benefit-cost view towards globalization and market competition. Although they perceive the consequences and normative meanings of globalization as twofold—on the one hand, representing the objective development of productive forces, and on the other hand, reflecting the interests of developed more than developing countries (Jiang 2006, vol. 2: 199-200)—they believe that China’s own efforts will determine whether the benefits of opening up

China's economy and participating in global competition can eventually outweigh the costs. If China takes actions and makes reforms to meet the requirements of the market economy, it can turn challenges into opportunities. For example, Jiang Zemin elaborated this dialectic view in the article titled "Taking Initiative in Fierce International Competition", in discussing the necessity for China to further integrate with the global economy:

Opportunities and challenges, as well as benefits and costs are all in relative sense; under certain circumstances, opportunities and benefits can become challenges and costs, and vice versa....Whether we could grasp opportunities and effectively deal with challenges depends on whether our works are effective and our countermeasures are proper. If our works are effective and countermeasures are proper, challenges can turn into opportunities, and costs can turn into benefits. If our works are not effective, even if we have opportunities, we may not be able to grasp them and then lose them (Jiang 2006 vol. 2: italics mine).

Therefore, Chinese leaders believed that in order to meet the challenges of globalization, China should not hold an absolutist view on state sovereignty and use economic nationalism as developmental strategy, but continue integrating with the global economy and making use of market competition to accelerate its economic reform. Only by forcing Chinese firms, especially large SOEs, to compete with successful foreign MNCs in both domestic and international markets would inefficient domestic firms take pro-market reforms, learn from their Western counterparts, and eventually win the competition. As Jiang Zemin confidently presented,

Economic globalization as an objective trend of the global economic development is independent of men's will; no country can avoid it. As today's world is an open world, no one can develop its own economy outside the world. We must steadfastly carry on the "reform and opening-up" policy, adapt to the trend of globalization, actively participate in international cooperation and competition, and make full use of all kinds of positive conditions and opportunities of economic globalization. We cannot be scared away from participating, because of the risks and negative effects, just as "we cannot give up eating because of the risks of choking" [yin ye fei shi]³² (Jiang 2006 vol. 2: italics mine).

4.2 Policy Implications of the Social Legitimacy of Economic Globalization

³² This is a Chinese idiom.

Chinese leaders' historicist belief in the inevitability of economic globalization means that they perceive market competition as a *necessary* way for Chinese firms and the nation as a whole to gain competitiveness, and thus rely more on liberalization and internationalization than on economic nationalism as national developmental strategies. The period of the late 1990s and early 2000s was the critical juncture when the globalization idea gained great momentum in shaping China's foreign economic policies. China adopted a comprehensive set of pro-globalization strategies, such as participating in the WTO, promoting overseas investment, and negotiating legalized BITs, to liberalize China's economy and internationalize its large SOEs. These approaches not only encouraged domestic firms to "go out," but also further opened up its own market to bring in more competition.

Legalized BITs play both functions, facilitating China's overseas investment and strengthening the inflow of foreign investment. The new BIT policies were initiated and implemented by the pro-globalization MOFCOM as the top leaders vigorously advocated the "going out" strategy and China's accession to the WTO in the late 1990s. Both "going out" and participating in the WTO are China's national developmental strategies reflecting a dynamic and dialectic benefit-cost view rooted in the historicist belief in the inevitability of globalization. Promoting China's overseas investment increases the material benefits and partially offsets the sovereignty costs of hard BITs; while the WTO negotiation and accession strengthens the momentum and the legitimacy of the globalization norm, sets a precedent for China to delegate disputes and make boundary-trespassing commitments in hard economic treaties, and thus lowers the normative premiums of signing legalized BITs.

4.2.1 WTO Decision Making and the Rising Legitimacy of Economic Globalization

In contrast to the "going out" strategy, which imposes no sovereignty costs on China, WTO

Agreements require China to make sweeping boundary-trespassing and binding commitments to open up its domestic market. Those unprecedented international obligations not only weaken states' economic control rights, but also increase competition and exert pressures on a variety of domestic economic sectors. Given the high sovereignty and adjustment costs of WTO membership, the negotiation process required complex bargaining among bureaucratic agencies, industries, and other domestic actors. The globalization norm did not naturally "diffuse" and gain legitimacy across the nation. When the WTO decision making was more pluralized and exhibited features of "fragmented authoritarianism" before the late 1990s, reform-oriented negotiators and officials often faced strong domestic ideational and institutional obstacles to making meaningful concessions and reaching agreements (Jackson and Oksenberg 1990; Pearson 2001; Feng 2006; Liang 2007).

It was only after the direct intervention of the highest leadership in the final stage of the negotiation that the globalization norm reached the tipping point in shaping China's foreign economic policies, including the BIT policies. Although top decision makers had long been enthusiastic about joining this "economic United Nations", viewing WTO membership as the recognition of China's social and great power status by the international community, they did not perceive participation as a *necessity* until they saw that economic globalization was an inevitable trend and that only market competition could further China's economic reform in the late 1990s (Interviews BJ080322; BJ080412). Scholars of China's WTO decision making almost unanimously agree that the pro-globalization leadership at the highest level, especially former President Jiang Zemin and Premier Zhu Rongji, played deterministic roles in finalizing China's WTO Agreements (for example, Fewsmith 2000; Lardy 2002; Pearson 2001; Feng 2006; Liang 2007). Once they set up the WTO accession as a national grand strategy, they became more

actively involved in the negotiation and swept away all domestic obstacles for China to make concessions.

The globalization norm gained increased legitimacy in China during this process for two reasons. First, under the slogan of “a small government and a large market,” Zhu Rongji directed an institutional reform to streamline China’s economic decision-making structure to deepen the economic reform in 1998. The restructuring eliminated or collapsed many agencies in charge of the “micro-economy,” while reinforcing the departments managing the “macro-economy” (Feng 2006: 129). It thus removed major institutional obstacles to WTO negotiation, as it greatly shrank the number of veto players and weakened protectionist forces, many of which are ministries in charge of specific “micro-economic” industries. At the same time, the reform increased the power of pro-globalization and pro-reform ministries in economic policymaking, such as the MOFCOM, which coordinates various economic branches and focuses on “macro-economic” management. Second, when the negotiation faced setbacks in the late 1990s,³³ the official and mainstream media, under the support of the top leaders, launched an “educational campaign” explaining to the general public the inevitability of economic globalization and the necessity for China to participate in the WTO (Lardy 2002; Feng 2006). Such propaganda set the official tone on economic globalization and WTO accession, marginalizing anti-globalization criticisms and ideational challenges.

³³ Zhu Rongji’s 1999 visit to the United States represents direct involvement of the highest leadership in WTO decision making. During this trip, Zhu brought with him a list of comprehensive concessions China could make and tried to reach a deal with the US. Nevertheless, President Clinton rejected the offer—a decision he regretted almost immediately—and also posted the full list of China’s commitments online, intending to see domestic reactions towards China’s offer. Zhu’s failed trip was perceived as a big humiliation by conservatives in China. The publication of China’s concessions also strengthened the voices of anti-WTO forces for a short period, as Zhu’s offer was approved only by a small number of top leaders, and even Ministers who were in charge of the most impacted industries were not informed. Some conservative officials and intellectuals even accused Zhu of “selling China.” Moreover, the NATO bombing of China’s Embassy in Belgrade in 1999 aroused another wave of nationalism and forced China to temporarily suspend the negotiations. Nevertheless, these two events only slightly

Chinese top leaders' historicist belief in economic globalization and its strong consciousness of market competition served as a "roadmap" for them to navigate through the uncertainties and lowered the normative premiums of accepting boundary-trespassing treaty provisions. One prominent example that exhibits the deterministic role of the highest leadership was the last round of negotiations with the United States. When the talks reached an impasse, Premier Zhu Rongji arrived at the site and personally spoke with American delegates. He broke the deadlock by accepting most of American's bargaining terms and reached a bilateral agreement with the US. Some Chinese WTO experts at Peking University and Remin University described the final decision on WTO concessions as a "big political gamble" for top leaders (Interviews BJ080224; BJ080305). However, "what enabled them to make the final call and take huge risks at that time," as a government official in the MOFCOM said, "was that they all realized that economic globalization was an inevitable trend. If China would eventually join the WTO, it would be better for us to participate earlier than later" (Interview BJ080415).

4.2.2 The Impacts of Economic Globalization and WTO Decision Making on Legalized BITs

Because of the top-down decision-making approach in the final stage of WTO negotiations, the globalization norm has gained widespread legitimacy and become the dominant economic idea in China. This has further lowered the normative premiums for China to make boundary-trespassing commitments in subsequent international treaties that reflect the globalization trend. Therefore, in contrast to the first norm-shaking event that required intervention from the highest leadership, negotiating and signing legalized BITs has become a routine practice undertaken by the pro-globalization MOFCOM. China's WTO negotiation and accession as well as the increased legitimacy of the globalization norm have had two major specific impacts on its BIT

delayed the pace of China's WTO accession. As the top leadership held a strong globalization belief and were determined to bring China into the WTO during their tenure, China restored negotiations with the US in late 1999.

policies since the late 1990s:

First, the WTO Agreements have set a precedent for China to make boundary-trespassing commitments and delegate disputes in legalized economic treaties. This has lowered the normative premium of loosening state control over all types of economic activities and eased the way for China to change relevant BIT provisions to keep them in line with the “spirit of the WTO.”

In the WTO Agreements, China promised to greatly open up its domestic market and liberalize its foreign trade and investment regime, accepting major investment-related obligations on both substantive and rule-based issues. Substantive issues refer to market access to FDI in service industries: China promised to open up many long-closed sectors to foreign investment and significantly lift restrictions for foreign firms to conduct business in China. Those previously closed industries include telecommunications and financial (banking, insurance, and securities) sectors, which have long been considered as critical to China’s national security, as well as distribution, audiovisual, and a variety of professional (legal, accounting, consulting, engineering, medical, etc.) services (Lardy 2002: 66-72). The most important rule-based commitments regarding investment are stipulated in the Agreement on Trade-Related Investment Measures (TRIMs). The TRIMs Agreement confirms one of the most fundamental principles of the WTO, the nondiscrimination and national treatment principle, and requires states to eliminate several investment measures that discriminate against foreign firms and result in trade distortions. Those prohibited measures include local content, trade balancing, and foreign exchange balancing requirements (Lardy 2002: 100). All of the commitments are binding and enforceable through the legalized WTO DSM, which set up a permanent and independent

tribunal to solve disputes among state parties.³⁴

Although the investment-specific provisions of the WTO Agreements are not as comprehensive as the trade-related ones, they have particular impacts on subsequent policy—and on rule-making regarding foreign investment. As a MOFCOM official said in an interview, the new BITs China has signed since the 2000s indeed limit state sovereignty more than the old ones did, especially when considering China as a capital-importing state vis-à-vis developed countries; but the new changes reflected the “inherent demands of the market economy and globalization.” Moreover, China did not suddenly change its positions on major BIT provisions; some of the new BIT obligations, especially the national treatment commitment, had already been made in and were “consistent with the spirit” of the WTO Agreements. “If we have already agreed to do these things in the WTO Agreements, we have no reason to reject them in the BITs” (Interview BJ080511).

Another MOFCOM official, Ma Yuchi, also points out in an article that the old treaties could not meet the requirements of strengthening the protection of foreign investment in the post-WTO era. “China’s politics, economy, as well as regulations and laws regarding foreign investment have experienced great changes in the past decade and especially since the accession to the WTO... Because most previous BITs did not include the important clause of national treatment, and other clauses, such as expropriation, transfer of foreign currency, and dispute resolution between the host state and private investors, also had many restrictions, old BITs provided relative weak protections for investment” (Ma 2007: 262). According to Ma, Germany,

³⁴ In fact, investment-specific obligations are just a small portion of the overall boundary-trespassing commitments China made. In addition to “normal” WTO requirements for most new members, China also agreed to accept many discriminatory treatments that apply only to China, especially in trade related safeguards and anti-dumping areas. The so-called “WTO-plus” requirements enable other countries to use lower than WTO-required standards to impose safeguards and anti-dumping measures on imports from China, but restrict China’s rights of retaliation as permitted by the WTO rules in the early stage of its accession. For detailed elaborations of major WTO commitments China made, see Lardy 2002: 63-106.

the Netherlands, and Finland were among the earliest developed countries to raise the requests for renegotiation. As China's BITs with developed countries were signed in the 1980s when China was in the early stage of its economic reform and was not a member of the ICSID Convention, the protection for investment in those treaties was the weakest among all the BITs China signed. Therefore, since 2003, China has started a series of renegotiations and updated its treaties with those countries to adapt to the new situations in the post-WTO era (Ma 2007: 262-263).

Second, the globalization norm and the WTO negotiation process have aroused Chinese elites' "legal consciousness" [*falv yishi*] and greatly strengthened their belief that "market economy is an economy of the rule of the law." Participating in economic globalization requires China to integrate with relevant legal regimes and keep up with the legalization trend of international economic laws. Therefore, the normative premiums for China to delegate disputes to the ICSID and use binding legal instruments to protect foreign investment have decreased gradually.

The WTO Agreements themselves constitute a complicated legal system. Throughout the long journey of China's WTO negotiation, many Chinese government officials have gradually realized that economic globalization will naturally restrict the power of the state, and that law rather than the government should govern the market economy. For example, Long Yongtu, former chief WTO negotiator and Vice Minister of the MOFCOM, characterized the "spirit of the WTO" as "rules and openness" (Long 2006). As he said, "the WTO accession represents a new stage of China's 'open-up' policy... *Because China has committed to follow the rules of the WTO, it will help us to build a socialist market economy based on the rule of the law... We have to follow international common rules to examine and review our current laws and regulations so*

that they can keep in line with international rules” (Long 2002: 7; Italics mine).

The compulsory DSM is arguably the most important WTO legal mechanism that arouses the “consciousness of rules” [*guize yishi*] of Chinese elites. Many government officials have developed a very positive view on mandatory dispute resolution, perceiving enforceable hard laws as representing a rising trend of the rule of law in international economic spheres. As stated by Yang Guohua, current Vice Director of the Department of Treaties and Laws in the MOFCOM, the WTO DSM represents that “international law has been implemented so well for the first time in human history, and has also exhibited a sign of changing from the so-called ‘soft law’ to ‘hard law’; therefore, the WTO is a very good example of the rule of the law in the international society” (Chinalawinfor Net 2011a). Moreover, many Chinese elites accept the view that economic disputes should be adjudicated or arbitrated according to legal principles without being influenced by political factors. For example, Zhang Yuqing, former Director of the Department of Treaties and Laws in the MOFCOM, highly praised the legalized WTO DSM as “an important development of international law in men’s civilization”—in large part because “both expert group and appeal tribunal make decisions completely according to the WTO rules without considering any political and other factors” (Chinalawinfor Net 2011b).

These new perceptions on legalized DSM differ from the traditional sovereignty-centered belief that disputes are better solved by flexible political means than by legal methods. Before the WTO accession, China mainly attracted FDI via policy instruments or administrative measures (such as preferential tax rates and other preferential policies in Special Economic Zones [SEZs]), rather than binding legal commitments, because the former is more flexible and imposes less sovereignty costs on the state. Accordingly, all of the BITs China signed at that time were soft law in nature.

As Chinese leaders' beliefs in economic globalization and in the rule of the law were greatly strengthened throughout the WTO negotiations, the normative premiums for China to delegate dispute resolution to international legal authorities gradually decreased. Many policymakers came to see the advantages of legal means over political approaches to solving economic disputes, accepting that it was time for China to use more binding BIT provisions to signal its commitment to the protection of foreign investment. As the MOFCOM official Ma Yuchi says, "the broadening of disputed issues that can be submitted to international arbitration reflects the international trend of strengthening the protection of foreign investment. *This change will help avoid politicizing economic conflicts, and also shows that China has more confidence on its own investment environment and on the international arbitration regime*" (Ma 2006: 265; italics mine).

Another MOFCOM official also stated in an interview that strengthening the protection of foreign investment and delegating disputes to the ICSID in BITs have become common practices of the international society in the past two decades. He especially emphasized that he and his colleagues began to realize when negotiating BITs with developing countries, that those countries as capital importers often required more liberal treaty provisions than China did. Some Latin American states that had signed BITs with the United States even required China to use the most liberal American model as the base for negotiation. Given that ever more developing countries have enthusiastically embraced the globalization and legalization trend, "*the problem is not whether we should accept the mandatory DSM, but how to improve it so as to keep balance between state sovereignty and investors' rights when signing those treaties*" (Interview BJ080521).

As China's WTO negotiation and accession greatly strengthened Chinese leaders' belief in

the inevitability of globalization and aroused their legal consciousness, decision makers have taken for granted certain degrees of restrictions on state autonomy by commonly accepted international rules and become more open to the liberalization and legalization trends in international economic affairs. Therefore, the increased social legitimacy of economic globalization has gradually lowered the normative premiums of ceding economic control rights and contributed to the changes in China's BIT practices since the late 1990s.

5. Sovereignty Costs and China's Reservations to Legalized BITs

Because of the increased material benefits of protecting its overseas investment as well as the rising social legitimacy of economic globalization, the BITs China signed in the last decade have become more liberal and legalized and imposed much higher sovereignty costs than previous ones. However, China does not stand at the forefront of the globalization trend, and its new BITs do not reach the highest degree of liberalization and legalization. When negotiating BITs, China has cautiously guarded its state sovereignty and tried to minimize the sovereignty costs by making reservations to major boundary-trespassing treaty obligations. China's conditional acceptance of the national treatment and DSM clauses demonstrates that state sovereignty has still played a very important role in determining China's national interests and BIT practices, even if the normative premiums of deviating from the Westphalian norm have decreased the most in the non-core economic issue areas.

The boundary-trespassing globalization norm cannot replace Westphalian sovereignty as the dominant ideational force in shaping China's foreign economic policies for two main reasons. First, as the metaphysical foundation for Chinese leaders to accept the social legitimacy of globalization is Marxist materialism, they do not view the trend per se as having innate moral meaning, and thus do not accept the normative legitimacy of globalization. And second, Chinese

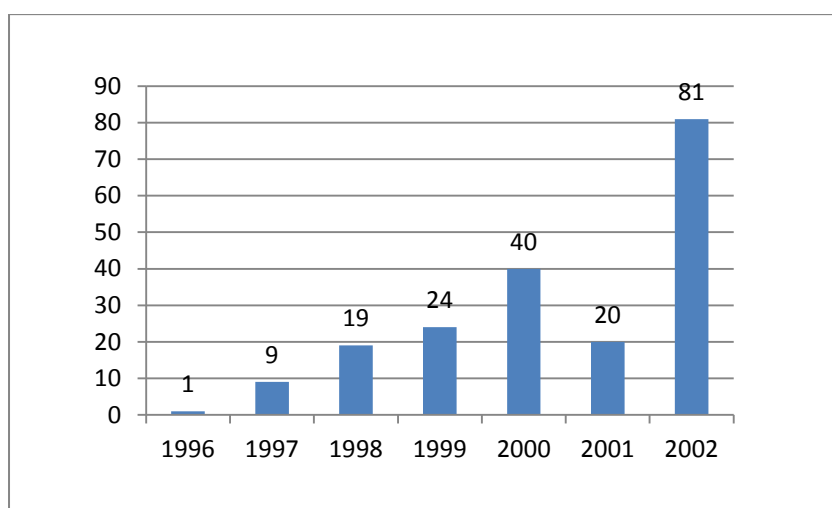
leaders still perceive that globalization is unfair in nature. Because Western developed countries determine the direction of the trend, they benefit the most from the “rules of the game,” with resulting negative impacts on developing countries and on China.

Because Chinese leaders perceive economic globalization as representing the “objective” demands of materialist productive forces, what the globalization norm changes is not the developmentalist national goal, but mainly the means for China to achieve the end. The *ultimate* aim for decision makers to further open up China’s economy and liberalize its trade and investment is to sustain rapid economic development and improve China’s national competitiveness vis-à-vis developed countries. Since the collapse of the Soviet Union and East European socialist states, Chinese ruling elites have felt the need to demonstrate to the people that China under the CCP’s leadership can exceed the achievements of the Western democracies. Slow economic growth will not only lead to undesirable economic and social consequences, but will also threaten the CCP’s domestic legitimacy. As the previous leader Deng Xiaoping trenchantly pointed out in the early 1990s, “If we have five years of non-development or low rate, such as 4 or 5%, or even 2 or 3% rate of growth, what would be the impacts? *This is not only an economic problem, but actually a political problem*” (Deng 1993 vol. 3: 354; italics mine).

The post-Deng leaders have experienced even greater pressures to keep the momentum of China’s economic development, because they perceive the world as full of competition, and the major competitors as the developed countries. Although economic cooperation and policy coordination are considered as necessary and inevitable in the globalization era, Chinese leaders believe that the competitive nature between states does not change, but is further strengthened by the globalization trend. They are not satisfied with improving the overall living standards of the

people, but aim to increase China's *relative* position in the international system and win the competition with Western democracies. A theme that Jiang Zemin constantly emphasized during his presidency was to “take initiative/become invincible in fierce international competition” [*zai jilie de guoji jingzheng zhong zhangwo zhudong/liyu bubai zhidi*] (for example, Jiang 2006 vol. 1: 282, 370, 441; vol. 2: 202, 281, 379, 421, 434; vol. 3: 7, 34, 44, 289, 418, 442-460, 470). As Figure 2.5 shows, the frequency of the term “competition”—specifically referring to market competition or international competition among states—increased significantly in the *Selected Works of Jiang Zemin* from 1998 to 2002.³⁵

Figure 2.5: Number of Times “Competition” Appears in *Selected Works of Jiang Zemin*



Because Chinese leaders do not accept the *normative* legitimacy of the globalization and market norms, they believe that the state should play an indispensable role in governing economic activities, albeit in a more limited manner in the globalization era. The “going out”

³⁵ The frequency of the concept “competition” reached its peak in 2002, with three articles heavily referencing the concept. “Taking Initiative in Fierce International Competition” is an article discussing China’s WTO accession and mentioning the term 35 times. “The Guideline and Main Tasks of Financial Works” discusses the impacts of financial globalization on China and the necessity for China to reform its financial system; it references the concept of competition 12 times. “Building a Well-Off Society, and Creating a New Prospect of Socialism with Chinese Characteristics” is the report of the 16th National Congress of the CCP—the most important national conference of the Party, which takes place every five years. The report analyzes the domestic and international situations and sets up the goals for the CCP in the next five years. The term “competition” appears 13

strategy is a state-led national developmental strategy; the purpose of economic reform is not to privatize large SOEs at micro-level, but to maintain the state-owned nature and improve performance through macro-level internationalization and liberalization strategies, so as to increase the competitiveness and material power of the state as a whole. As Jiang Zemin emphasized, “the facts that our country can have such a strong comprehensive national power and important international status nowadays and that our economy can steadily and continuously develop in fierce international competition demonstrate the great and indispensable roles of SOEs”; “we must not pursue privatization; this is a fundamental principle and shall not be deviated even slightly” (Jiang 2006 vol. 2: 378; 389). Therefore, the social legitimacy of economic globalization does not fundamentally change the statist view and weaken the sovereignty belief of Chinese leaders.

In addition to the materialist and competitive nature of Chinese leaders’ globalization belief, they still perceive that globalization has unfair features and negative impacts. On one hand, the legitimacy and positive effects of globalization originate from its reflection of the “objective” development of productive forces. On the other hand, “the trend of economic globalization is evolving and developing under the situation that the old unfair international economic order has not substantively changed” (Jiang 2006, vol. 2: 200). As Jiang Zemin points out, “‘the rules of the game’ of the international economy were established mainly under the leadership of Western countries and all international economic and financial organizations are under the control of the US and other developed countries; they would always make use of those advantages to pursue economic hegemonism and to maximize their own benefits” (Jiang 2006, vol. 2: 201).

The “double-edged-sword” effects of economic globalization will inevitably bring costs to China alongside potential benefits, with the major sources of risk stemming from the “economic

hegemonism” of Western countries. Although believing in the inevitability of globalization enables Chinese elites to develop a dynamic and dialectic view on the benefit-cost calculation, this does not mean that they pay less attention to the risks than to the opportunities when integrating with the global economy. When Chinese leaders emphasize that China has to “take initiative in fierce international competition” and “adapt to the globalization trend”, they mean that China should not only steadfastly uphold the “reform and opening-up” policy and actively seek opportunities, but also “be aware of the possible risks of economic globalization, maintain independence, be vigilant, and enhance the capability of countering the risks, so as to solidly safeguard [its] national economic security and better develop and strengthen [itself]” (Jiang 2006 vol. 2: 201). Given that Chinese leaders perceive Western developed countries as potential competitors and as the sources of injustice in the international economic order, they have always been cautious about state sovereignty when opening up China’s market to the outside world.

As the social legitimacy of economic globalization cannot unlimitedly weaken Chinese leaders’ sovereignty belief and thus significantly lower the normative premiums of ceding economic control rights, the Westphalian sovereignty has played an indispensable role in determining China’s national interests and influencing its foreign economic policies. The contents of China’s new BITs clearly exhibit Chinese decision makers’ attempts to minimize the sovereignty costs of boundary-trespassing obligations and to balance its mixed interests of a capital-importer and -exporter. As Li Chenggang, current Director of the Department of Treaties and Laws in the MOFCOM, explicitly states,

Nowadays, China is not only a capital-importing, but also a capital-exporting great power. *As a capital-importer, we emphasize more on keeping rights in hands [liu quan zai shou]; while as a capital-exporter, we emphasize more on market openness and rights protection.* Because of our mixed roles, we have mixed demands when negotiating and designing investment rules. *In this new situation, we should not pay attention to only one and neglect the other aspects, but should balance China’s dual*

roles as a capital-importer and -exporter (Li, C. 2012:4).

Although implementing the “going out” strategy increases the material benefits for China to sign legalized treaties with developing countries, and the globalization trend lowers the normative premiums of loosening its control over foreign investment to a certain extent, the concerns about state sovereignty when negotiating with developed countries have limited the degree of liberalization of China’s new BITs. As a MOFCOM official said in an interview, because China perceived itself as a capital-importer vis-à-vis developed states, the major concern when negotiating with those countries was state sovereignty; if developed countries did not request renegotiation, China would not take the initiative to ask them to do so (Interview BJ080523). His words indicate that on the one hand, the globalization norm has indeed lowered the normative premiums of ceding economic control rights, as China would not reject signing legalized treaties with developed countries; on the other hand, because deviating from the Westphalian norm even in a non-core economic area still imposes sovereignty costs on China, it is actually reluctant to update the old treaties and will not do so except under pressure from its Western counterparts.

Moreover, once China starts renegotiation with developed countries, it will try to minimize sovereignty costs by making reservations to boundary-trespassing provisions in treaty protocols. For example, although the formal treaty texts of China’s new BITs grant private investors national treatment at the post-establishment stage, the protocols state that with regard to China, the treatment clauses do not apply to the following situations: “(a) any existing non-conforming measures maintained within its territory; (b) the continuation of any such non-conforming measures; (c) any amendment to any such non-conforming measure to the extent that the amendment does not increase the non-conformity of these measures” (e.g. BIT with Germany in

2003). That means that China has the right to maintain any inconsistencies between its practices and treaty provisions that existed before the entry into force of the new BITs. Nevertheless, China promises that it “will take all appropriate steps in order to progressively remove the non-conforming measures.” Chinese officials call these reservations a “stand still” clause [*dongjie tiaokuan*], which is not compulsory and functions as “soft obligations” [*ruan yiwu*] (Interview 080412; Ma 2007: 264). This reservation provides China with an unspecified transition period and allows it gradually to narrow the gap between its practices and the national treatment commitments without being punished for the continuation of nonconformities.

As for the delegation mechanism, Chinese government officials indeed recognize the increasingly important role of the ICSID in solving investment disputes and would like to follow the international trend of legalization. Yet they are not completely satisfied with the ICSID regime, considering the arbitration procedures “expensive and time-consuming” and many of ICSID’s previous decisions “controversial” (Ma 2007: 266, 267). Especially given that some private investors may abuse the mechanism and exert unnecessarily high sovereignty costs on host states, they believe that it is proper to maintain as much policy autonomy as possible and require investors to seek domestic remedies before resorting to international arbitration (Interview BJ080425).

Therefore, in order to lower the sovereignty costs of the mandatory DSM, China has made unilateral reservations in renegotiated BITs with developed countries. Most treaty protocols recognize that China may require investors to exhaust its domestic administrative review procedures before the submission of any dispute to international arbitration. Meanwhile, China promises that the administrative review process shall not exceed three months. The combination of the “exhaustion of local remedy” principle and the time limit for domestic procedure indicates

China's efforts to balance between state sovereignty and the compulsory DSM. Although China tries to keep dispute resolution within domestic terrain and use administrative rather than legal means to solve disputes, the three-month limit ensures that the reservation clause cannot indefinitely delay or prevent investors from resorting to international arbitration.

The reservations that China has made in its new BITs enable it to maintain certain degrees of policy autonomy and minimize the sovereignty costs of legalized BITs. Although Chinese leaders believe that the new treaties can help protect China's overseas investment and that China should follow the globalization trend, the sovereignty norm determines that they could accept only the lower-bound of boundary-trespassing obligations in legalized BITs. As stated in an interview with a MOFCOM official, "because of the concern of sovereignty, our BIT template follows the relatively conservative German type, not the more liberal American type; moreover, we also insert the 'stand still' clause and require investors to exhaust domestic administrative review, so that we can maintain as much sovereignty as possible when signing treaties with developed countries" (Interview BJ080425).

6. Conclusion

This chapter examines why China has changed its long-time conservative stance toward legalized BITs, being willing to grant national treatment to foreign investors and delegate dispute settlements to the ICSID since the late 1990s. It suggests that both the new material interest of promoting China's overseas investment and the ideational force of the increased social legitimacy of economic globalization have contributed to the recent change in China's BIT practices.

When China was a capital-scarce state with the main purpose of attracting FDI in the 1980s and early 1990s, policymakers were unwilling to make binding legal commitments and signed

only soft BITs. However, as China's foreign exchange reserves and material power increase significantly, its leaders have actively pursued the "going out" strategy and begun to reevaluate the benefits and costs of BITs from the perspective of a capital-exporting state. The increased material benefits of protecting its own investments in foreign countries have partially offset the rise in sovereignty costs for more liberal and legalized BITs. In the meantime, Chinese leaders have gradually accepted the new boundary-trespassing idea that economic globalization is an inevitable trend independent of men's will, and that integration with the global economy is a necessity rather than a choice. The globalization norm gained great momentum in shaping China's foreign economic policies during the final stage of China's WTO negotiations, and has since then greatly reduced the normative premiums for China to further loosen state control over foreign investment and accept compulsory DSM in legalized BITs.

However, the new material interest and boundary-trespassing belief cannot completely replace the traditional sovereignty norm in shaping China's BIT policies. Chinese policymakers are especially concerned about the encroachment on state sovereignty when viewing China as a capital-importing state vis-à-vis developed countries, and designing reservations to minimize the sovereignty costs of the new treaties. Despite the significant changes in China's BIT practices in the most recent decade, China does not accept the national treatment and compulsory DSM clauses unconditionally, and its new BITs do not reach the highest degrees of liberalization and legalization. The reservations China has made to the boundary-trespassing obligations indicate that Chinese leaders have tried to reconcile its material interests, the globalization belief and the sovereignty norm, and to maintain a delicate balance between its dual roles as a capital-importer and -exporter at the same time.

Chapter Three

State Sovereignty vs. Human Rights: China's Opposition to the Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court (ICC) is by far the only “hard law” in the international human rights and criminal law areas at the global level.³⁶ One major contribution of the treaty is that it creates an independent ICC, a permanent court with inherent and compulsory jurisdiction over four types of core crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. It also grants prosecutors the right to investigate a crime not only based on referrals by states or the United Nations Security Council (UNSC), but also in response to information provided by individuals and NGOs. The Statute was adopted in 1998 at the Rome Conference and entered into force in 2002. By February 2013, 121 countries had become parties to the treaty.

China is among only seven states that voted against the Rome Statute in 1998.³⁷ At first glance, its rejection of the ICC seemed unusual, given that the normal pattern of China's approach toward international treaties and multilateral cooperation has been non-obstruction. For example, China's voting behavior in the UNSC has usually been “restrained, measured and largely acquiescent” (Wuthnow 2011: 32). Even when it does not agree with its Western interlocutors or the “majority will” regarding humanitarian interventions, it often abstains, rather than casting a negative vote. In terms of negotiating and signing international treaties, China rarely takes a confrontational stance to reject an agreement widely supported by both developed and developing countries. China's Deputy Head of the Delegation to the Rome Conference, Liu

³⁶ Other legalized human rights regimes exist all at regional levels, such as the European Court of Justice (ECJ).

³⁷ The other six countries voting against the Rome Statute were Iraq, Israel, Libya, Qatar, the United States, and Yemen.

Daqun,³⁸ acknowledged that the Rome Statute was the only multilateral treaty that China had voted against (Liu, D. 2006:1).

The reasons for China's non-cooperative stance on the Rome Statute are two-fold. On the one hand, although China has become more open to the human rights norm and international humanitarian practices in recent decades, Chinese leaders' acceptance of the social legitimacy of the norm has been limited, and they have always emphasized that human rights cannot be superior to state sovereignty. The normative premiums for China to deviate from the Westphalian norm in human rights issue areas have not been reduced meaningfully, mainly because the boundary-trespassing norm is often intertwined with issues regarding China's core sovereignty and regime security. Chinese leaders are more likely to perceive human rights issues as "tools of Western/international hostile forces" than universal principles with absolute value and uncontested meaning.

On the other hand, the hard law nature of the Rome Statute itself has imposed extremely high sovereignty costs on China and deterred it from participation. Unlike soft-law types of international human rights treaties, which have only limited encroachment on state sovereignty, major treaty provisions of the Rome Statute have greatly strengthened the independence and authority of the ICC vis-à-vis states, and may also have negative implications on China's core sovereignty and regime security. Moreover, the treaty does not allow any reservations or flexible arrangements for China to exempt its core national interests to lower the sovereignty costs. Therefore, Chinese negotiators had opposed all major boundary-trespassing treaty provisions and eventually voted against the Rome Statute at the Rome Conference.

This chapter is organized as follows. The first section describes the hard-law features of the

³⁸ Liu was the Deputy Head of the Delegation and Deputy Director of the Department of Treaty and Law of the Ministry of Foreign Affairs. He has also been a judge for the United Nations International Criminal Tribunal for the Former Yugoslavia since

Rome Statute and briefly reviews the process of negotiating the treaty from 1993 to 1998. The second part provides an overview of China's positions on major treaty provisions during the negotiations. It then analyzes former President Jiang Zemin's discourses on human rights from 1989 to 2000 and explains why Chinese leaders' acceptance of the social legitimacy of the norm has been limited. The fourth section focuses on the implications of major boundary-trespassing treaty provisions for China's core sovereignty and regime legitimacy, and demonstrates the high sovereignty costs for China to accept the Rome Statute. It then draws a conclusion in the fifth section.

1. ICC as an Institutional Innovation

The human rights regime has undergone a revolutionary change and become an important pillar of global governance over the past thirty years. The strengthening of the regime has redefined the meanings of security as well as the boundary of state sovereignty vis-à-vis a broad range of individual rights. As former UN Secretary-General Kofi Annan said in his Nobel Peace Prize acceptance speech: "In this new century, we must start from the understanding that peace belongs not only to states or peoples, but to each and every member of those communities. *The sovereignty of States must no longer be used as a shield for gross violations of human rights.* Peace must be made real and tangible in the daily existence of every individual in need. Peace must be sought, above all, because it is the condition for every member of the human family to live a life of dignity and security" (Annan 2001; italics mine).

The ICC is the only independent court of the global human rights regime to "help end impunity for the perpetrators of the most serious crimes of concern to the international community" (ICC Website). The idea of establishing a permanent international criminal court has frequently been raised in the international society since the end of the WWII. However,

geopolitical confrontation during the Cold War forestalled the development of such a court. Progress was renewed in the early 1990s. During a special session of the General Assembly (GA) on transnational drug trafficking, Trinidad and Tobago proposed an international court to assist states in prosecution.³⁹ In response, the GA resolution directed the International Law Commission (ILC) to elaborate a draft statute for the court in 1992 (UN 1992a). After the ILC submitted its draft, the GA established an Ad Hoc Committee in 1994 and a Preparatory Committee (PrepCom) in 1995 to discuss the draft and prepare for a diplomatic conference (UN 1995a, b). Following a series of sessions of the PrepCom from 1996 to 1998, the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC was held in Rome from June 15 to July 17, 1998. The Conference finally adopted the Rome Statute of the ICC by 120 states in favor, with twenty-one abstentions and seven nations voting against.

The Rome Statute was an institutional innovation and breakthrough in the areas of international human rights and criminal law. Four major features stipulated in the Rome Statute make the treaty a hard law and the ICC a very strong and independent court. First and foremost, the ICC has inherent and compulsory jurisdiction over four types of core crimes if *either* the territorial state (within whose borders the alleged crime has been committed) *or* the suspect state (nationality of the suspect) is a state party to the Statute (ICC 2001: 10). This means that the Court will have jurisdiction over crimes as long as *one* of the above two states ratifies the treaty, even if the other state is not a party. Moreover, even if neither of the above states ratifies the treaty, the ICC can still exercise jurisdiction when the crime is referred to it by the UNSC. Thus, not only will states parties automatically accept the Court's jurisdiction upon ratification or

³⁹ The Rome Statute, however, does not incorporate transnational drug trafficking as a crime within the ICC's jurisdiction, because most states agree that the Court should have jurisdiction over only the most serious international crimes.

accession, but non-state parties may also be subject to the Court's rule in certain circumstances.⁴⁰

Second, in terms of the relations between the ICC and national courts, although the Rome Statute designates the ICC as a complement to national courts in adjudicating crimes, it can step in to conduct an investigation and open a trial if the Court decides that a state or national court is “unwilling or unable” to prosecute matters on its own (ICC 2001: 13). Third, the triggering mechanism of crime investigation grants the Prosecutor of the ICC the right *ex officio* to start an investigation. The Prosecutor can investigate a crime not only when a situation is referred to him/her by states parties or by the UNSC, but also when he/she gets the consent of the Pre-Trial Chamber of the Court on the basis of information received from other sources, such as individuals or NGOs (ICC 2001: 11). Finally, the Rome Statute does not allow any reservations for states to opt out of their obligations (ICC 2001: 72).⁴¹ States must accept the treaty as a whole and cannot selectively accept treaty provisions when ratifying or acceding to the Rome Statute.

The institutional feature of the Rome Statute of the ICC is a puzzle for many political observers (Deitelhoff 2009; Goodliffe and Hawkins 2009). The ILC, authorized by the GA to draft a statute for a criminal court, first envisaged a very weak court and preserved a great degree of national autonomy for states in the 1994 proposal. In contrast to the highly legalized Rome Statute, the ILC draft was a very soft law and prioritized state sovereignty in almost every dimension. The ICC was designed as a subordinate to national courts, and its jurisdiction depended on the consent of states. The court had inherent jurisdiction only over genocide, yet for

⁴⁰ A good example is the Libya case. Libya voted against the Rome Statute at the Rome Conference and thus is not a state party of the treaty. Yet the ICC issued an arrest warrant for Libya's former Leader Colonel Gaddafi, his son Saif al-Islam, and Abdullah al-Senussi, head of Libya's state security services, based on UNSC Resolution 1970, which referred Libya's situation to the ICC.

⁴¹ Under article 124, a state, on becoming a party to the Statute, can declare that, for a period of seven years after the entry into force of the Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to war crimes. However, seven years is a short period, and the exemption is limited to war crimes.

other crimes, the ILC proposed an opt-in mechanism: states could choose for which crimes they would like to accept the court's jurisdiction, either upon or at any time after ratification. Moreover, the court was a less independent entity than the UNSC, which had greater control over the trigger mechanism. The prosecutor did not have much autonomy to launch investigations, but could take action only in cases referred by states parties or the UNSC; the ICC could not take up cases the Council processed under its Chapter VII responsibilities (ILC 1994).

The ILC intended to achieve “the widest possible adherence of states” to the statute (ILC 1994: 31) and its draft reflected the political reality at the early negotiation stage, as most states, especially great powers, did not want to surrender much state sovereignty to a supranational ICC. During the negotiation, two key groups emerged with divergent opinions. The first was under the leadership of the Permanent Members of the UNSC (P5 group⁴²), whose preferences were largely reflected by the 1994 ILC draft; this group had dominated the negotiation process in the early period. The second was the Like-Minded (LM) group composed of small and middle powers and supported by a global NGO coalition, the Coalition for an International Criminal Court (CICC). This group opposed the conservative ILC draft and advocated a strong and independent court. Even before 1997, the LM group had been unable to achieve a majority; yet their voices and influence had increased over time.

A turning point appeared between 1997 and 1998 before the convening of the Rome Conference. During this period, states' positions changed dramatically, and many states that had previously preferred a conservative ICC or had no clear opinions began to support a stronger and more independent court. According to Deitelhoff (2009), the shift of the international normative

⁴² P5 denotes a group of states sharing similar conservative opinions to those of the five permanent members of the UNSC, but does not mean the five permanent members only.

environment was mainly due to a series of regional conferences sponsored by the LM group and the NGO coalition, CICC, in Latin America, Africa, and Central and Eastern Europe. Those regional conferences were designed as informal forums to exchange ideas among government officials, NGOs, and experts outside the formal UN-based negotiation settings, but they resulted in “unexpectedly progressive positions toward the ICC that were almost identical to those of the LM group” (Deitelhoff 2009: 56).

Moreover, the switch of positions of the UK and French delegations after the changes in their government in 1997 dismantled the great-power coalition and greatly contributed to the shift in the international normative equilibrium and balance of power between the two groups during the last year on the way to the Rome Conference. If the P5 group could have held together to the end, the final version of the treaty might have been more conservative than the current Rome Statute; in that situation, China might have voted for a much softer treaty or at least abstained. Nevertheless, the views of the LM Group eventually prevailed at the Rome Conference, and the Rome Statute differs radically from the original soft ILC draft. As a result, both the United States and China cast negative votes, while other great powers, such as Russia and India, chose to abstain.

2. China’s Positions on the ICC during the Negotiations

China generally supported the establishment of a permanent international criminal court. What it opposed with the LM group and the 1998 Rome Statute were the format and jurisdiction of the Court. It preferred a soft treaty and a conservative model of the ICC with limited jurisdiction over limited types of crimes. China’s positions on the ICC reflected an overarching normative frame of state sovereignty; it was even reluctant to view the establishment of the ICC as a human rights issue, but tended to perceive it as war-related security politics. Because

Chinese delegates held strong sovereignty rather than human rights beliefs, they diverged from the LM group on four major issues regarding the power and status of the Court: the relations between the ICC and national courts; the Court's inherent and mandatory jurisdiction; the Prosecutor's *ex officio* rights to investigate crimes (i.e. the triggering mechanism); and the scope of crimes under the Court's jurisdiction.

First, Chinese negotiators insisted that the relations between the ICC and national court should be defined by "the most important guiding principle" of complementarity, which means that "[s]tates must bear the primary responsibility" to adjudicate crimes: the ICC "*could function only as an adjunct to national courts*" and should not exercise its jurisdiction "when a case was already being investigated, prosecuted or tried by a given country" (UN 1998a: 75; 1996a: 20; italics mine). As Chinese delegate Chen Shiqiu elaborated the principle at the 25th meeting of the Sixth Committee in 1995, the ICC could apply its jurisdiction only "when it was impossible for national courts to formally try someone accused of a serious international crime... The international criminal court should not supplant national courts, nor should it become a supranational court or act as an appeal court for national court judgements" (1995c: 13).

Although the Rome Statute recognizes the "complementarity" principle in its Preamble and Article 17 stipulates that the Court could intervene only when national courts were "unwilling or unable genuinely to carry out the investigation or prosecution" (ICC 2001: 13), Chinese delegates believed that this article and other substantive treaty provisions actually violated the principle and overrode state's judicial sovereignty. They suggested that the ICC should apply its jurisdiction only when national courts were "unable" to try a case—i.e., "*in the event that a State's judicial system collapsed*" (UN 1998b: 6)—but have no rights to judge whether a national court is "unwilling" to take an action or whether an investigation or prosecution by a

national court is fair. However, Article 17 stipulates that the Court can judge the ongoing legal proceedings of any state, including a non-party. If it decides that intention exists to shield a crime or the trial is not fair, it can exercise its jurisdiction and retry a case (ICC 2001: 13). Chinese negotiators strongly opposed this Article. They argued that allowing the ICC to judge the judicial system and legal proceeding of a state and to negate the decision of a national court actually makes the Court “an appeals court sitting above the national court”, and that “it was highly possible that *such a provision would be abused for political purposes*” (UN 1998b: 6).

Second, Chinese delegates had “serious reservations” concerning the inherent and mandatory jurisdiction of the Court, which “directly infringed on the judicial sovereignty of States”; they argued that the acceptance of the Court’s jurisdiction must “be in accordance with the principle of State sovereignty” and “based on the voluntary consent of States Parties” (UN 1998b: 5; 1996a: 20; 1995c: 14). As delegate Duan Jielong said in 1997, “the inherent jurisdiction of the court, when extended to cover all core crimes, would accord precedence to the court over national courts; that was clearly at variance with the principle of complementarity and could adversely affect the cooperation between States and the court and the effective functioning of the court” (UN 1997a: 12).

During the negotiations, Chinese delegates promoted an “opt-in” mechanism, which would allow states the freedom to choose whether and for which crimes they would like to accept the Court’s jurisdiction. Under this mechanism, signing and ratifying the Statute would not mean that a state automatically accepts the Court’s jurisdiction (UN 1993: 5). The court could exercise its jurisdiction over only states parties that had given their pre-consents upon ratification, but not over parties that did not accept its jurisdiction—let alone over non-party states.

However, Article 12 of the Rome Statute requires all states parties to automatically accept

the ICC's jurisdiction. Moreover, even if a state is not a party to the Statute, it cannot completely avoid the Court's jurisdiction, as long as it belongs to a dyad of "territorial state" and "suspect state", and the other state in the dyad accepts the Court's jurisdiction (ICC 2001: 10).⁴³ Such a provision is far beyond the positions of the Chinese government. It not only grants the ICC mandatory jurisdiction over states parties, but also "impose[s] an obligation upon non-parties and constitute[s] interference in the judicial independence or sovereignty of States" (UN 1998a: 123-124).

Third, Chinese delegates intended to narrow the definitions of core crimes and limit the scopes of crimes that fall into the Court's jurisdiction. They especially opposed the inclusion of "domestic armed conflicts" and "violation of human rights in peaceful time" within the definitions of war crimes and crimes against humanity respectively, asserting that "the criteria determining jurisdiction [should be] the *universality* of the consequences of the crime and the *seriousness* of the crime", and "*what the international community needed at the current stage was not a human rights court but a criminal court that punished international crimes of exceptional gravity*" (UN 1995c: 14; 1998b: 6).

Chinese delegates tended to perceive the establishment of the ICC from a security rather than a human rights perspective, and suggested that only *armed conflicts in international setting* could be serious and extensive enough to justify the concern of the entire international society,

⁴³ As Article 12 states:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the

while human rights violations in domestic contexts or in peaceful time would not. In terms of war crimes, the Chinese delegates insisted that international customary law usually restricted such crimes in an international setting, and that previous international treaties concerning crimes committed during domestic armed conflicts were still incomplete; therefore, the definition of war crimes in the Statute “far exceeded...customary international law” (UN 1998b: 5). With regard to crimes against humanity, as Chinese delegate Qu Wensheng argued:

[T]hey were crimes committed during wartime or during an extraordinary period related to war time... The Rome Statute failed to link those crimes to armed conflicts and thereby changed the major attributes of the crimes. In listing specific acts constituting crimes against humanity, *the Statute added a heavy dose of human rights law...The injection of human rights elements would lead to a proliferation of human rights cases, weaken the mandate of the Court to punish the most serious crimes and thus defeat the purpose of establishing such a court* (UN 1998b: 6; italics mine).

Fourth, Chinese negotiators did not agree that the Prosecutor should have the right *ex officio* to initiate an investigation based on information received from any sources, such as NGOs and individuals, insisting that only states parties and the UNSC could refer cases to the Court. The Chinese government’s major concern regarding the triggering mechanism was that an independent Prosecutor and broader access to the Court by all types of state and non-state actors may lead to the abuse of the Court and the encroachment of state sovereignty (UN 1998a: 5; 1998b: 6).

As Chinese decision makers perceived states as the major actors of the international society, they did not think that non-state NGOs and individuals should enjoy the same legal status. Moreover, they believed that those actors would not focus on the most serious crimes with universal consequences, i.e. war-related crimes in international contexts, and that information provided by them would divert the Court’s attention. More importantly, if the Prosecutor could

crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

initiate investigations *proprio motu* on the basis of information provided by those actors, “that means that *the authority of the Prosecutor was so extensive that he or she could influence or interfere with the judicial sovereignty of a State*” (UN 1998b: 6; italics mine). Therefore, as maintained by Wang Guangya, Head of the Chinese delegation to the Rome Conference , “a cautious approach should be adopted when addressing such questions as trigger mechanisms and means of investigation, *in order to avoid irresponsible prosecutions that might impair a country’s legitimate interests*” (NU 1998a: 75).

China’s positions over all major issues, such as the relations between the ICC and national court, the compulsory jurisdiction of the ICC, definition of core crimes falling into the Court’s jurisdiction, and the Prosecutor’s *ex officio rights*, reflect more conservative and sovereignty-oriented values; while the strong boundary-trespassing and legalized features of the Rome Statute embody more the liberal human rights views of the LM group. Given that huge gaps exist between China’s stances and major provisions of the Rome statute, it is not surprising that the Chinese government has chosen to stay outside the treaty regime.

3. Superiority of State Sovereignty over the Human Rights Norm

China’s negative attitudes and strong opposition towards major boundary-trespassing treaty provisions during the negotiation of the ICC indicate that Chinese leaders still prioritize state sovereignty when discussing human rights and humanitarian issues. Although China has actively participated in the international human rights regime and softened its stance on sovereign authority since the late 1970s, its leaders’ acceptance of the social legitimacy of the human rights norm has been limited and restrained. Because Chinese leaders tended to perceive the norm as intertwining with issues regarding China’s core sovereignty and regime security and as potential instruments to be used by “Western/international hostile forces” to “Westernize and divide

China”, they have always emphasized that sovereignty is the precondition for individuals to enjoy human rights and that the meanings of the rights are relative and contextual, rather than absolute. The sense of insecurity aroused by the human rights idea and some humanitarian practices means that the boundary-trespassing norm can only reduce the normative premiums of deviating from the Westphalian principle to a limited degree, and that China is not ready to accept human rights and humanitarian obligations with high sovereignty costs.

The superiority of state sovereignty and the limited degree to which Chinese leaders accept the social legitimacy of the human rights norm are most evident in former President Jiang Zemin’s discourses on human rights. In the three-volume *Selected Works of Jiang Zemin*, twenty-six articles written between 1989 and 2000⁴⁴ reference the concept of “human rights [renquan]”. In nineteen (more than 80%) of those articles, “human rights” and “humanitarianism” are explicitly or implicitly associated with “Western states” or “Western/international hostile forces” and treated as their tools to “Westernize and divide [xihua fenhua] China”⁴⁵ or to “interfere domestic affairs [ganshe neizheng]” of China and developing countries. The seven articles that do not attribute any instrumentalist meaning to human rights indeed recognize the universality and positive values of the norm; yet six of them have qualifications, either emphasizing the superiority of state sovereignty or the relative meaning of human rights. The only article that does not impose any conditions on the legitimacy of human rights and humanitarianism is discussing the rights of disabled people—the least politicized minority group in China.

Viewing human rights as potential threats to China’s regime security and unification imposed by Western countries shows that Chinese leaders have a strong sense of insecurity when

⁴⁴ This time period covers the international negotiations on the establishment of the ICC.

facing the human rights norm and relevant issues. Because of regime and ideological differences between China and its Western counterparts, Chinese leaders have profound distrust for the West, believing that Western/international hostile forces “view China as a thorn on their side” (Jiang vol. 3: 8), “do not want to see a socialist China becoming unified and stronger” (Jiang 2006 vol. 3: 139), “and will not stop attacking China and interfering China’s internal affairs” (Jiang 2006 vol. 3: 235). Such a sense of insecurity has greatly influenced their perceptions on the relations between human rights, regime security, and state sovereignty. As Jiang Zemin said in a CCP Central Committee’s meeting in 2000,

Nowadays, China is the biggest socialist state in the world and has continuously developed and become increasingly wealthier and stronger. *Western hostile forces have intensified all types of means and measures to implement the political strategy of Westernizing and dividing our country, and sought to sabotage CCP’s leadership and China’s socialist regime. Their political schemes will definitely not change. In recent years, they have ceaselessly made use of the so-called “human rights”, “democracy”, “freedom”, “ethnic” and “religious” issues as well as Dalai Lama and the Taiwan issue to launch attacks on us. They have also colluded with those so-called overseas “pro-democracy activists” and our domestic hostiles and attempted to take joint actions with those people.* The struggles of infiltration and anti-infiltration and of subversion and anti-subversion between us and all types of domestic and foreign hostile forces will be long-lasting and complex (Jiang 2006 vol. 2: 83; italics mine).⁴⁶

Jiang’s statement reveals that Chinese leaders not only perceive the West as potentially hostile forces, but also view domestic and overseas “dissents” and “secessionists/separatists” (usually ethnic minorities from Tibet and Xijiang as well as “Taiwan-independence forces [*taidu shili*]”) as internal and external enemies, who are most likely to attract international attention and are empowered by the international human rights norm and humanitarian practices. Therefore, in Chinese leaders’ eyes, human rights and humanitarianism as well as other values of democracy and liberty have never been purely about individual Chinese people’s rights and

⁴⁵ “Westernizing China” refers to threats to China’s one-party regime and CCP’s leadership, and “dividing China” refers to threats to China’s territorial and national unification.

freedoms, but intertwined with other more dangerous and explosive ethnic, religious, and territorial issues, such as Tibet and Taiwan, and can therefore be used by both international and domestic “enemies” to challenge China’s national unification and regime security. Jiang Zemin specifically pointed out this threat in the article titled “On Works concerning Ethnic Affairs”:

In China’s modern history, *ethnic secessionist movements have always been provoked by foreign invading forces, and ethnic secessionists have always been the internal agents of foreign invading forces to seize our territories in boarder areas...* We must rely on the people of every ethnicity, strongly oppose and expose the evil activities of “Taiwan independence” forces; and be aware of and against the conspiracies of some international forces that support exiled secessionists, make use of “Pan-Islamism”, “Pan-Turkism”, or other flags, and incite secessions in some areas of our country... A small number of separatists have ignored the history and reality and never ceased their activities of dividing China. *They collude with external hostile forces, coat with religions, and wave the banner of ‘democracy, freedom, human rights’ and ethnic unification to provoke chaos and riots and to undermine the stability and unity of Tibet;* they fabricate all types of lies, deceive people who do not understand the truth, and coin the so-called ‘Tibet issue’, in order to ‘internationalize’ the problem” (Jiang 2006 vol. 1: 190-191).

Because of the potential threats that the boundary-trespassing norms of democracy, freedom, and human rights may impose on China’s core sovereignty and regime legitimacy, Chinese leaders’ recognition of the universality of those ideas has often been restrained. Although nowadays ever more developing countries—usually the reference group for China to gauge the legitimacy of international norms and institutions—have democratized, Chinese leaders have still tended to associate the democratization movements in the third world with the “sinister motives” and interference of the West and believed that blindly embracing those “Western” ideas will do more harm than good to developing countries (Jiang 2006 vol. 2: 371). As Jiang Zemin said in a speech on China’s strategic relationship with the third world in 2000:

Since the end of the Cold War, *the West has intensified the political strategy of “Westernizing and dividing” the third world, waved the flags of “democracy”, “freedom”, and “human rights”, and forced developing countries to adopt Western-*

⁴⁶ Jiang made similar comments on the Western threats to China’s regime security and unification on various occasions. See, for example, Jiang 2006 vol. 2: 521-522; vol. 3: 235.

style multi-party regime. Being impacted by the so-called ‘democratization’ waves, many countries have experienced political unrests, delayed economic development, and the increase of conflicts caused by ethnic, religious and territorial disputes. *Those are the results of swallowing the “political poison” of copying Western political systems without considering domestic situations* (Jiang 2006 vol. 2: 371; italics mine).

Although the spread of the norms of democracy, liberty, and human rights at the global level may further strengthen Chinese leaders’ concerns about the negative impacts of those ideas on China’s unification and political stability, the rising trend has significantly changed China’s external normative and institutional environments, making Chinese leaders more responsive to international pressures and more open to commonly accepted standards and practices. Chinese leaders have been more likely to recognize the social legitimacy of the human rights norm and show their support to international humanitarian activities if doing so will not harm China’s core sovereignty and regime legitimacy.

In examining Jiang Zemin’s discourses on human rights, five of the seven articles that do not attribute instrumentalist meanings to human rights are speeches and talks Jiang gave in *international arenas*; while sixteen of the nineteen articles that associate human rights with Western or international hostile forces are targeting exclusively *domestic audiences*. These differences indicate that although Chinese leaders tend to view the norm and relevant issues as tools of the West, they are also aware of their widespread legitimacy at the global level and intend to show China’s support of the human rights norm and humanitarian practices when facing international audiences.

For example, when Jiang Zemin spoke on the relations between human rights and sovereignty at the UN Millennium Summit in 2000, he recognized that “the full realization and enjoyment of human rights is the common ideal pursued by the entire human race. Any country will have obligations to promote and protect human rights and basic freedom of its own people,

in accordance with international human rights treaties as well as its own national situations and relevant laws”⁴⁷ (Jiang 2006 vol. 3: 113). Moreover, on various occasions, Jiang also emphasizes that one important goal of the CCP is to protect and respect the human rights of the Chinese people, and that China’s human rights conditions have significantly improved since the CCP came into power (Jiang 2006 vol. 1: 244; 334; vol. 2: 52; 54; 56; 258). Such pride in China’s progress regarding human rights issues indicates that Chinese leaders do recognize the positive meaning of human rights, and that the norm has started to have some influence on China’s policy aims and national interests.

However, due to their concerns about the potential misuse of the norm by both domestic and international “hostile forces”, Chinese leaders accept its social legitimacy under the condition that human rights goals must not supersede the more superior sovereignty norm (Jiang vol. 1: 123; 244; 479; vol. 2: 52; 55; 425; vol. 3: 110-111; 113-114). For example, in a different speech Jiang Zemin gave at the UN Millennium Summit in 2000, he mentioned the concept of “human rights” three times, yet each time prioritized state sovereignty over human rights:

The dialogues regarding human rights issues must be carried out on the basis of respecting state sovereignty; this is the most fundamental and effective ways to protect and promote human rights causes. As long as there exist state borders in the world and people live in their own countries, protecting national independence and sovereignty is the highest interest of every national government and its people. Human rights cannot be discussed without sovereignty (Jiang 2006 vol. 3: 110-111; italics mine).

Moreover, Chinese leaders tend to emphasize the relative meanings of the norm, viewing the realization of human rights as contingent on the socio-economic status of each state and

⁴⁷ The title of the speech, however, is “State Sovereignty is the Precondition and Safeguard for the People of a State to Fully Enjoy Human Rights”. In the same talk, Jiang also states, “China and many developing countries have been invaded and bullied by foreign powers for a long time in modern history. *The Chinese people have deeply understood that if a country cannot protect its sovereignty, it cannot talk about human rights at all.* Therefore, we especially cherish the liberation and state sovereignty gained with blood and lives through long-time struggles by the Chinese people” (Jiang 2006 vol. 3: 114; italics mine).

treating “sustainability and development [*shengcun quan he fazhan quan*]” as the most important rights of the Chinese people (Jiang 2006 vol. 1: 334; 338; vol. 2: 52; 54; 56). As Jiang said in a luncheon speech when he visited the United States in 1997, “Nowadays, the human rights that our people enjoy have been unprecedented. China is a developing country with more than 1.2 billion population; *this national situation determines that the rights of sustainability and development are the most fundamental and important human rights in China*. If the problem of how to feed the people and keep them warm cannot be solved, it is impossible to pursue other types of rights” (Jiang 2006 vol. 2: 53; italics mine).

Chinese leaders’ cautious attitudes toward the international human rights norm are in clear contrast to their enthusiasm for economic globalization. Although Jiang Zemin’s works on globalization also recognize the negative impacts of the trend on China and view globalization as benefiting developed Western nations more than developing countries, he confidently deems economic globalization an inevitable trend independent of men’s will and asserts that no country can develop outside the global market. Accepting the social legitimacy of the globalization idea enables Chinese leaders to develop a dynamic and dialectic view on the benefits and costs of participating in legalized economic institutions and reduces the normative premiums of ceding economic control rights to independent legal authorities.

Nevertheless, the high percentage of Jiang Zemin’s works viewing human rights as tools of “hostile forces” to “Westernize and divide China” indicates that Chinese leaders consider *more* of the potentially negative impacts of the norm on China’s regime security and core sovereignty than its positive and universal value. Although they have been more open to the norm and more responsive to international pressures in recent decades, their acceptance of the social legitimacy of the norm has been relatively limited, given the more rapid change of the international

normative environment. As the normative premiums of ceding sovereign authority have not been reduced enough by the boundary-trespassing human rights norm, the time is not ripe for China to take on international human rights and humanitarian obligations that impose high sovereignty costs on states.

4. High Sovereignty Costs of the Rome Statute on China

Although the limited degree of Chinese leaders' acceptance of the human rights norm is the most important reason that they rejected the Rome Statute, the unprecedented boundary-trespassing and legalized features of the treaty itself also deter China from participation. The Rome Statute reflects more liberal human rights views and is in conflict with China's preferences in almost all dimensions. Major boundary-trespassing treaty provisions not only require every state to transfer more control rights to the centralized ICC, but also empower other non-state actors, such as NGOs and individual rights activists, and may have potentially negative impacts on China's core sovereignty and regime legitimacy. As the Rome Statute does not allow any flexible arrangements or reservations to compromise its completeness, China cannot exempt its core sovereignty from the treaty's jurisdiction to lower the sovereignty costs. Therefore, China did not recognize the social legitimacy of the treaty and eventually voted against it at the Rome Conference.

4.1 Implications of the Definitions of Core Crimes on China

Because the dominant concern for Chinese leaders regarding human rights issues is the potential danger that the norm will be used by "hostile forces" to interfere in China's domestic affairs, the Chinese delegates focused during the negotiations on trying to minimize this possibility by limiting the jurisdiction and authority of the court vis-à-vis sovereign states. As the Head of the Chinese Delegation Wang Guangya stated at the beginning of the Rome Conference,

“[the Chinese] government believed that the International Criminal Court, to be independent and fair, should not be subject to political or other influence, and *should not become a tool for political struggle or a means of interfering in other countries’ internal affairs*... *Maximum flexibility should be exercised* in defining the jurisdiction of the Court, the crimes that could be prosecuted, and the modes in which countries accepted the Court’s jurisdiction” (UN 1998a: 75).

However, the strong hard law features and certain boundary-trespassing treaty provisions, such as broader definitions of core crimes, the *ex officio* rights of the Prosecutor to initiate investigations, and a strong court with automatic and compulsory jurisdiction, may increase the chances that China’s “internal” affairs will become “internationalized” and thus constrain China’s autonomy to handle sensitive issues concerning its core sovereignty and regime legitimacy.

During the negotiation of the ICC, Chinese delegates tried to narrow the definition of core crimes and limit the scope of crimes that could be prosecuted by the Court. They tried to restrain the court’s jurisdiction to only *war-related* humanitarian issues in *international* contexts, as opposed to human rights violations in *peaceful* time and armed conflicts in *domestic* settings. If the definitions and scope of core crimes cannot be restrained to the “most serious” crimes with “universal consequences”—judged by China’s standards—some of Chinese government’s actions of handling internal affairs, such as suppressing dissidents and separatists, and even taking Taiwan by force, may fall under the ICC’s jurisdiction and incur the intervention of the Court.

For example, Article 7 of “Crimes Against Humanity” specifies eleven types of crimes “committed as part of a widespread or systematic attack directed against any civilian population”. It includes many human rights violations, such as torture, enforced disappearance,

sexual violence, and imprisonment and deprivation of physical liberty in violation of fundamental rules of international law; but it does not limit the definition of crimes in wartime (ICC 2001: 3-5). Judging by these criteria, serious and massive wrongdoing during the suppression of political riots or rebellions even in peaceful time can fall into the Court's jurisdictions. Had China become a state party of the Statute, this article might have tied its hands to deal with threats to its core sovereignty and regime legitimacy, especially in ethnic minority regions such as Tibet and Xinjiang.

In fact, the process of China's integration with the international human rights regime has not been an entirely happy journey. The Tiananmen Square incident in 1989 put China in the spotlight of the regime, as the Chinese government's authorization of the use of force against student demonstrations immediately aroused criticism around the world. Western states imposed economic sanctions on China in the following two years, and China's human rights situations were the focus of debate in the UN Commission of Human Rights (UNCHR) for almost a decade. Although the UNCHR is not an independent legal authority and its resolution has no binding effects on states, the annual review of China's situation exerted great pressure on Chinese leaders throughout the 1990s; each year, the government made great efforts to mobilize political support and fight against pro-rights coalitions to prevent the Commission from passing resolutions condemning China (Kent 1999; Foot 2000). Thus, it is imaginable that if a situation concerning China were referred to the ICC, which has automatic and compulsory jurisdiction, China would be less able to block the Court's actions than it did to the UNCHR, and the consequences of a case being investigated and prosecuted by the Court would be more serious than being discussed in the UN venues.

The situations concerning China most likely to be referred to the ICC in the name of "crime

against humanity” are issues related the suppression of political riots in Tibet and Xinjing. This probability is high because there has always been political unrest of different scales in these regions over the past three decades. For example, former President Jiang Zemin expressed concern about the rising disturbances in Tibet and Xinxiang in several articles: “*in recent years, secessionist movements of the Dalai group have increasingly intensified...* They have incited many riots and even attempted to escalate situations and spread secessionist movements and chaos to agricultural and pastoral areas” (Jiang 2006 vol. 1: 393). Similarly, “under the support of international hostile forces, *domestic and overseas secessionist forces have created a series of riots and violent terrorist events in Xinjiang*” (Jiang 2006 vol. 2: 158; italics mine).

Given that Chinese leaders perceive national unification as China’s core sovereignty and secessionist activities as top threats to China’s national and regime security, they tend to take strong measures to maintain political and social stability in ethnic minority regions. As Jiang Zemin emphasizes, “[we must] *forcefully strike secessionist movements and crimes in Tibet; handle emergencies firmly, resolutely, and promptly; nip potential riots in the bud.* Be highly alert to the infiltration and sabotage activities of international hostile forces and the Dalai Group and crack them down once they are detected” (Jiang 2006 vol. 1: 394-395). In terms of Xinjiang, “we must unite together, strongly oppose and forcefully clamp down activities that destroy ethnic and national unification ... *We must not hesitate or compromise even slightly on such critical issues*” (Jiang 2006 vol. 2: 158).

Therefore, had the Chinese government used force to suppress political riots and secessionist movements in certain extreme situations,⁴⁸ overseas ethnic minorities as well as

⁴⁸ The largest and most violent ethnic unrest in the reform era occurred in Tibet in 1989, just a few months before the Tiananmen Incident. At that time, the Chinese government suppressed the riots forcefully and even enforced martial law in Lhasa from March 1989 to May 1990 (People’s Net). This action in Tibet also raised widespread criticism, especially from Western countries. During this period, both the European parliament and the American

other state and non-state actors would have resorted to the ICC to sue Chinese leaders and challenge the legitimacy of the government's action. Some Chinese scholars specifically point out that the Tibet issue is very likely to be referred to the Court by "Western anti-China forces" in the name of "crimes against humanity" (Tan, S. 2003: 67-68; Zhang, L. 2009: 257-262). As Tan Shigui, a leading scholar on criminal law, maintains, although human rights acts concerning China had constantly been defeated at the UNCHR, "[Western anti-China forces] do not submit to defeat. The establishment of the International Criminal Court undoubtedly allows [them] to see new 'hopes', and the crime against humanity within the ICC's jurisdiction may also become 'judicial arms [sifa wuqi]' for them to interfere China's internal politics" (Tan, S. 2003: 68).

Besides Article 7 on crimes against humanity, the inclusion of "domestic armed conflicts" in the category of war crimes could also have negative impacts on China's core sovereignty regarding the Taiwan issue. As Article 8 stipulates, "the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes" (ICC 2001: 5). Had China accepted the Rome Statute, the treaty would have weakened China's deterrence strategy, empowered pro-independence forces in Taiwan, and even enabled the ICC to exercise jurisdiction over China's resorting to force to solve the Taiwan issue.

In order to deter Taiwan from pursuing *de jure* independence, the Chinese government had long before declared its position that it would not give up military force to solve the Taiwan issue. As Deng Xiaoping said in 1979, "we try to use peaceful means to bring Taiwan back to the motherland and achieve national unification. *The problem is that if we promise that we will not use military forces, it will tie our hands and make the Taiwan authorities refuse to negotiate with*

Congress passed resolutions regarding the human rights situation in Tibet, and the Committee of the Nobel Prize granted the Dalai Lama the "Nobel Peace Prize" in 1989. Moreover, in the annual meeting of the UNCHR, the Tibet

us for peaceful reunification. This will in turn lead to the use of military force to solve the problem” (State Council 2009: 154; italics mine).

This deterrence strategy was further strengthened and legalized in China’s Anti-Secession Law in 2005. The law was deliberated and passed by the National People’s Congress (NPC) against the background of a series of initiatives to push forward pro-independence agendas and challenge the status quo across the strait, promoted by Taiwan’s former leader Chen Shui-bian, a member of the pro-independence Democratic Progressive Party (DPP). Article 8 of the Anti-Secession Law says, “in the event that the ‘Taiwan independence’ secessionist forces should act under any name or by any means to cause the fact of Taiwan’s secession from China, or that major incidents entailing Taiwan’s secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, *the state shall employ non-peaceful means and other necessary measures to protect China’s sovereignty and territorial integrity*” (Xinhua Net 2005; italics mine).

As the definition of war crimes of the Rome Statute does not exclude domestic armed conflicts, had the Chinese government used military force to solve the Taiwan issue, such an action may have fallen into the Court’s jurisdiction and incurred its investigation. As stated in an article by Zhang Lei, a Chinese expert on the ICC at Beijing Normal University, if the Taiwan authority pursues independence, “the Chinese government must resort to military force to solve the Taiwan issue, and armed conflicts will be inevitable. Such conflicts are similar to ‘non-international armed conflicts’ under the definition of war crimes of the Statute; once conflicts begin, international anti-China forces may make use of the ICC in the name of war crime to intervene, investigate, and even sue China’s military actions of resuming Taiwan, and interfere China’s internal politics... This is one of the major reasons that the Chinese government rejects

the Statute and does not participate in the ICC” (Zhang, L. 2009: 256-257).

In fact, the ICC has already been perceived by some pro-independence Taiwanese as an effective tool to counter China’s deterrence strategy. On the same day that the ICC was established at The Hague on July 7, 2002, several human rights and pro-independence NGOs in Taiwan formed the Taiwan Coalition for the International Criminal Court. The Convener of the Coalition, Li Shengxiong, is also the secretary-general of the pro-independence organization, World United Formosans for Independence. Li argues in an article on war crimes: “Because China’s violation of human rights has been well-known by the world and it also threatens Taiwan by more than 400 missiles and its military force, it does not dare to sign the Rome Statute and participate in the ICC. Therefore, Taiwan should become a member of the ICC as soon as possible, so as to not only safeguard international human rights, but also save ourselves from external invasions and wars, and avoid domestic events of genocide and crimes against humanity” (Li, Shengxiong 2003).

4.2 Implications of Prosecutor’s ex officio rights on China

Besides the definition of core crimes, the Chinese government also worries about the negative impact of the Prosecutor’s *ex officio* rights on China’s core sovereignty and regime legitimacy. In terms of the triggering mechanism, the Article 15 of the treaty grants the Prosecutor the right to initiate an investigation *proprio motu* based on all types of information received from states parties and the UNSC, as well as from other non-state actors such as intergovernmental organizations, NGOs and individuals (ICC 2001: 11). Such a provision grants the Prosecutor great power and independence and also provides non-state rights activists access to the Court. This may weaken the Chinese government’s control over cases being referred to the Prosecutor and lead to “irresponsible prosecutions that might impair a country’s legitimate

interests” (UN 1998a: 75).

Chinese officials’ worries about the abuse of the system by rights activists and the Prosecutor are explicitly expressed by Chinese delegate Qu Wensheng in a Six Committee’s meeting in 1998:

In the first place, article 15 ... empowered individuals, non-governmental organizations and other bodies to bring cases before the Court and *gave them virtually the same right as States parties and the Security Council to trigger the Court’s jurisdiction mechanism. As a result, the Court would be faced with a huge number of complaints from individuals and non-governmental organizations*, and therefore would not be able to concentrate its limited resources on dealing with the most serious international crimes ... Secondly, if the Prosecutor could initiate investigations *proprio motu* on the basis of such information, *that meant that the authority of the Prosecutor was so extensive that he or she could influence or interfere directly with the judicial sovereignty of a State*” (UN 1998b: 6).

The Chinese government’s concerns about NGOs’ and individuals’ roles in bringing cases to the ICC is not unfounded. In fact, the international NGO coalition—the Coalition for the International Criminal Court (CICC)—had supported the LM group throughout the negotiations and played an indispensable role in advocating for the Rome Conference to adopt the more liberal and legalized Rome Statute. The CICC originally started with only 25 NGOs in 1995, but grew to 450 in less than two years. CICC members took part in the Rome Conference and represented the largest delegation, with nearly 500 participants. The group currently includes 2,500 civil society organizations in 150 different countries, and it continuously works to strengthen international cooperation with the ICC (CICC website).

Several CICC members are perceived by the Chinese government as potential “hostile forces” with the aim of “Westernizing and dividing China.” In addition to the aforementioned Taiwan Coalition for the ICC, Human Rights Watch and Amnesty International are two major influential NGOs that might provide information concerning China to the Court. Both organizations are founding members of the CICC and currently among its 16-member steering

Committee.

Ever since the Tiananmen Incident in 1989, both organizations have strengthened their scrutiny of China. In their annual reports on world human rights conditions, the China sections usually contain information about the government's maltreatment of political dissidents, human rights violations in ethnic minority regions, censorship, and suppression of non-official political and religious organizations. Among those issues, how the Chinese government treats "separatists" in ethnic minority regions, such as Tibet and Xinjiang, is especially concerning to China's core sovereignty, but has also attracted special attention from human rights NGOs. For example, the *World Report* published by Human Rights Watch has criticized the government's activities and policies in Tibet during every year since 1989 and in Xinjiang almost every year since 1990; it has also started to comment upon political development and human rights conditions in Hong Kong since 1992 (Human Rights Watch Website).

As a result, Chinese leaders have always been vigilant against these groups. Their strong distrust and aversion to these influential human rights NGOs has rarely changed as China deepens its integration with the international society. For example, Chen Shiqiu, a former Chinese UN delegate who stated China's positions on the ICC several times at the Sixth Committee, criticized Amnesty International's 2008 Annual Report specifically linking the Tibet issue with China's Olympic games: "under the cover of the human rights slogan to ruin China's image, and to achieve the goals of destroying China's peace, stability, national unity, and social progress" (Xinhua Net 2008). Even at the beginning of this year, the official newspaper *People's Daily* published a series of articles attacking the Human Right Watch 2013 *World Report*, accusing it of "ignoring objective facts" (Li, Shian 2013), "acclaiming for criminal activities in Tibet, casting a bone between the central government and Tibetan people" (Zhang, Y. 2013), and

representing “a political collusion of condescending and self-righteous moralists to badmouth China” (Liu, J. 2013).

In addition to the concern that international human rights NGOs might refer situations concerning China to the ICC, the Chinese government also worried that the Prosecutor’s rights to initiate investigation *proprio motu* might lead to interference in China’s domestic affairs and even unfavorable consequences with legally binding effects. In order to check the Prosecutor’s power and ensure that he/she would not represent “the West” or be used by “hostile forces”, Chinese delegates proposed during the negotiations that the composition of judges in the Pre-Trial Chamber should represent all major legal systems and regions of the world, because without the consensus of the Chamber, the Prosecutor cannot start an investigation solely based on information provided by NGOs and individuals. However, the Rome Statute does not incorporate China’s suggestion of diversifying the composition of the Chamber; this may increase the possibility that both the Prosecutor and the Chamber represent the values and voices of “Western countries”, which are norm entrepreneurs most critical of China’s human rights situations. As Chinese delegate Qu Wensheng explained China’s opposition to the Statute at a meeting of the Six Committee in 1998,

Although a Pre-Trial Chamber was provided for in the Statute with a view to preventing the abuse of authority by the Prosecutor, in order for such a mechanism to be effective, either the members of the Pre-Trial Chamber, or the members of the Chamber and the Prosecutor, should be the product of different legal systems and different political and cultural backgrounds. The Statute, however, contained no such provision. *It was possible, therefore, that both the members of the Pre-Trial Chamber and the Prosecutor might come from the same region or share the same legal, political or cultural background. That would neutralize the Pre-Trial Chamber’s check-and-balance role* (UN 1998b: 6; italics mine).

4.3 High Sovereignty Costs of Compulsory Jurisdiction of the ICC

Even if the definitions of core crimes and the Prosecutor’s *ex officio* rights have strong

boundary-trespassing features and Chinese leaders do not internalize the human rights norm, China might have still been able to sign the Rome Statute or at least abstain, had the treaty adopted an opt-in mechanism to allow states to choose whether and for which crimes they accept the ICC's jurisdiction. Such a mechanism would significantly lower the sovereignty costs of the Statute and change the nature of the treaty from hard to soft law. However, the Rome Statute not only requires states to accept the compulsory jurisdiction of the ICC automatically upon ratification or accession, but enables it to exercise jurisdiction over non-state parties in certain circumstances. Since China cannot exempt issues concerning its core sovereignty from the Court's jurisdiction, it refused to accept the social legitimacy of the Rome Statute, even if the majority of states at the Rome Conference supported the treaty.

The adoption and the entry into force of the Rome Statute indicate that the international normative environment has changed greatly in recent two decades as the international society has attached more importance to the human rights norm vis-à-vis state sovereignty. The Rome Statute is the first and only hard law in the human rights issue area at the global level. Previous human rights and criminal law treaties lack compulsory jurisdiction or centralized enforcement institutions and do not impose high sovereignty costs on states. Accordingly, even if the normative premiums for China to cede sovereign authority are not particularly low, China has accepted many human rights treaties and actively participated in a variety of humanitarian activities.

Before the Rome Statute, China had already signed 18 human rights treaties, and in the same year after China voted against the Statute, it also signed the International Convention on Civil and Political Rights (ICCPR) in October 1998 (Jiang 2006 vol. 2: 54). Nevertheless, those treaties are soft law in nature and cannot match the degree of legalization of the Rome Statute. They allow

states either to make reservations or to adopt opt-in approaches to choose whether or to what degree they would accept certain compulsory mechanisms. For example, the 1984 Convention Against Torture (CAT) defines the crime of torture and stipulates a series of obligations for states, yet the main body of the treaty itself does not include a mandatory enforcement mechanism. It was not until 2002 that the United Nations adopted the Optional Protocol of the CAT, which established an independent and compulsory inspection institution, the Subcommittee of the Committee Against Torture. The Subcommittee has the right to regularly visit “places where people are deprived of their liberty” (UN 2002). A state that signs and ratifies CAT does not automatically accept the obligations of the Optional Protocol. Thus the Subcommittee can conduct compulsory inspections only in those states that ratify the Protocol. Because of the soft law nature of the CAT, China signed the treaty in 1986 and ratified it in 1988. However, the boundary-trespassing features and high sovereignty costs of the Optional Protocol have prevented China and most other states from participating: it had only 72 signatories and 63 states parties by January 2013 (UN 2013a).

The CAT case as well as China’s policies on the UNCLOS discussed in Chapter 2 demonstrate that even if Chinese leaders are not ready to accept boundary-trespassing obligations with high sovereignty costs, they are willing to show their support and follow the “majority will” of the international society as long as a treaty provides certain flexible arrangements that allow states to exempt issues concerning their core sovereignty.

As Chinese leaders worry about China’s international image and do not want to stay outside major international institutions, when negotiating the Rome Statute, delegates tried to promote the “opt-in” mechanism so that China could sign the treaty without necessarily accepting the ICC’s jurisdiction. As they constantly emphasized, “it was essential to distinguish between

acceptance of the Statute and acceptance of the jurisdiction of the Court” (UN 1993: 5); the opt-in mechanism “would allow States...to choose whether they would accept the Court’s jurisdiction over all crimes or only over certain crimes...especially since countries still had differences over which crimes should fall under the jurisdiction of the Court and how those crimes should be defined” (UN 1998b: 6). In contrast, “the requirement that States parties should accept inherent jurisdiction would exclude many countries otherwise willing to become parties to the Statute” (UN 1998a: 189).

Moreover, in order to soften the hard-law nature and minimize the sovereignty costs of the treaty, Chinese delegates promoted the standard of “universality” for the international society to gauge the social legitimacy of the treaty, and suggested that only a court without inherent and compulsory jurisdiction could ensure universal participation. As delegate Li Yanduan maintained at the Rome Conference, “The opt-in system would allow many countries to become parties to the Statute and allow the Court to acquire universality in a very short period of time. After that, the countries concerned could gradually accept the jurisdiction of the Court. The fact that the Court enjoyed universal support would serve as a strong deterrent with regard to the core crimes” (UN 1998a: 189).

However, China’s proposals could not gain support from the majority of states, and the Rome Statute reflects the more liberal human rights and legal views of the LM group. Article 12 of the treaty not only rules out the opt-in option and requires all states parties to accept the Court’s jurisdiction, but it also allows the Court to exercise jurisdiction over core crimes, as long as *either* the territorial state *or* the suspect state is a party to the Statute; in that situation, even the *non-party* state of the dyad cannot completely avoid the court’s jurisdiction. This Article constitutes the most boundary-trespassing and legalized treaty provision of the Statute and

contradicts most strongly the sovereignty belief held by Chinese leaders. Moreover, Article 120 also clearly states that “No reservations may be made to this Statute” (ICC 2001: 72), thus eliminating the possibility that China could exclude issues regarding its core sovereignty from the Court’s jurisdiction.

Because major boundary-trespassing treaty provisions regarding the definition of core crimes, the *ex officio* rights of the Prosecutor, and the automatic and compulsory jurisdiction of the ICC may have negative impacts on China’s core sovereignty and regime security, Chinese leaders have been reluctant to accept the social legitimacy of the treaty. Even if the treaty had been supported by most states at the Rome Conference, Chinese delegates still emphasized that only “universality” represented by “consensus” of all states, rather than “majority will” reflected by “voting” could grant the treaty social legitimacy. As the Deputy Head Liu Daqun concluded when he explained China’s negative vote at the end of the Rome Conference: “[The treaty] should be adopted on the basis of consensus, not of voting. The history of negotiating international treaties had proved that no convention adopted by a vote would be assured of universal participation” (UN 1998a: 124).

5. Conclusion

The Rome Statute of the ICC is the most legalized human rights treaty at the global level. The Statute creates a permanent and independent Court to prosecute individuals for genocide, aggression, war crimes, and crimes against humanity. It grants the Court inherent and mandatory jurisdiction and the Prosecutor the *ex officio* rights to investigate and prosecute crimes. The adoption of the treaty indicates that the international society has attached increasingly great importance to the human rights norm vis-à-vis state sovereignty.

However, China’s positions on the Rome Statute are in conflict with all major treaty

provisions, and reflect more conservative and sovereignty-centered views. Given that the human rights norm often intertwines with issues concerning China's core sovereignty and regime security, Chinese leaders tend to perceive the norm and relevant issues as instruments of the West and "hostile forces" to "Westernize and divide" China. The sense of insecurity aroused by the boundary-trespassing norm has greatly restrained Chinese leaders' acceptance of its social legitimacy. They tend to prioritize state sovereignty and pay greater attention to the negative impacts of human rights on China's core national interests than to the universal values and positive meaning of the norm. As the normative premiums of ceding sovereign authority are only limitedly reduced through integration with the international human rights regime, China has not been able to take on international obligations with high sovereignty costs.

In the meantime, major boundary-trespassing treaty provisions of the Rome Statute may have negative implications on China's core sovereignty and regime security. The broad definitions of core crimes, easy access to the Court by human rights NGOs and activists, an independent Prosecutor with *ex officio* rights, and the inherent and compulsory jurisdiction of the Court may increase the chances that situations concerning Tibet, Taiwan and regime legitimacy would be referred to the Court and lead to serious consequences with legally binding effects. Moreover, the treaty does not allow any flexible arrangements for China to opt out its core sovereignty and thus imposes extremely high sovereignty costs on China. Therefore both the limited degree of Chinese leaders' acceptance of the human rights norm and the unprecedented boundary-trespassing and legalized features of the treaty led to China's rejection of the Rome Statute.

Chapter Four

Maritime Rights and the International Order of the Sea: China's Decision Making on

Signing and Ratifying the United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS) is a comprehensive international agreement defining the rights and responsibilities of states in their use of the oceans. It resulted from the Third United Nations Conference on the Law of the Sea (the LOS Conference hereafter), which took place from 1973 through 1982 with the goal of regulating increasingly fierce competition for ocean resources and bringing a stable maritime order to the international community. The Convention was adopted in 1982 and entered into force in 1994. It terminated the old freedom-of-the-seas doctrine that had governed the oceans for nearly three centuries and became the “constitution for the oceans,”⁴⁹ shaping the new international order of the seas. By June 2010, 160 out of 192 UN member states had ratified or acceded to the Convention.

Although the LOS Conference was held in the 1970s and early 1980s, while the negotiation of the Rome Statute was in the 1990s, China's positions on issues regarding core sovereignty and its attempts to use an opt-in mechanism or reservations to lower the sovereignty costs of an international agreement were very similar across the two cases. In fact, without the exclusion clause allowing states to exempt all territorial and military disputes from the mandatory DSM, the UNCLOS would resemble the Rome Statute in imposing extremely high sovereignty costs on China, and China would not even sign the treaty in the first place.

However, because of the exclusion clause, the UNCLOS is more similar to BITs, with the

⁴⁹ “A Constitution for the Oceans” is the title of an article adapted from the statements of the President of the LOS Conference, Tommy T. B. Koh, delivered on 6 and 11 December 1982 at the final session (Koh 1982: 1).

mandatory DSM having effects solely on non-core sovereignty issue areas, unless a state chooses not to apply the clause. Therefore the evolution of China's policies towards the UNCLOS after the treaty was adopted exhibited similar features to its approaches to legalized BITs: the changes in China's material interests regarding deep-seabed mining and its acceptance of the social legitimacy of the UNCLOS in the 1990s led to its decision to ratify the treaty in 1996. Increased material benefits partially offset some of the sovereignty costs of ratification, and the social legitimacy of the UNCLOS reduced the normative premiums of delegating noncore control rights to international authorities. However, as China's position on issues regarding core sovereignty have rarely altered over the past three decades, it applied the exclusion clause and made additional reservations to minimize the sovereignty costs of the UNCLOS after ratifying the treaty.

This chapter begins in Part 1 with a review of major treaty provisions of the UNCLOS and moves to discuss China's positions toward the Convention during the LOS Conference in Part 2. It explains how the changes in China's material interests in deep-seabed mining led to its acceptance of the pioneer investor regime of the UNCLOS in Part 3, and it examines how the policies of critical states and the ratification momentum around the world influenced China's perceptions of the social legitimacy of the Convention, and its approaches towards non-core sovereign control rights, in Part 4. Part 5 discusses the impact of internalizing boundary-reinforcing treaty provisions on China's sovereignty beliefs and its reservations to the UNCLOS regarding core sovereignty; Part 6 concludes.

1. The UNCLOS and the New International Maritime Order

The LOS Conference was held in the heyday of the third world movement promoting the New International Economic Order (NIEO); the UNCLOS is a product of third-world

revisionism against the old international maritime order. During the negotiations, developing countries were able to speak in one voice on many key issues and to exert influences on major treaty provisions. As Krasner argues, the Conference was one example of “the third world against global liberalism” (Krasner 1985: 231-232), and the UNCLOS gave “the *coup de grace*” to the traditional maritime order based on the “freedom-of-the-seas” principle (Krasner 1985: 6). Although the negotiation process during the Conference reflected structural conflicts between developing and developed countries in the 1970s as Krasner depicts, the final version of the 1982 UNCLOS is a balanced treaty, and the new maritime order that emerged out of the Convention has been widely accepted by both developed and developing states around the world.

The revolutionary features of the UNCLOS manifest in a number of major substantive and procedural provisions. First and foremost, the Convention extends the sovereign rights and jurisdictions of coastal states and privatizes or “territorizes” large parts of previous high seas by legitimizing states’ claims over territorial seas, contiguous zones, exclusive economic zones (EEZ), and continental shelves.

The old freedom-of-the-seas doctrine limited national rights and jurisdiction to the narrow territorial sea within three nautical miles from a nation’s coastlines; those waters beyond national boundaries were free to all states but belonged to none of them. Such a principle was challenged by increasing national claims over offshore resources in the seas far beyond three nautical miles. In 1945, President Truman of the United States raised the first major challenge to the old doctrine by unilaterally extending US jurisdiction over all natural resources on its continental shelf. Other nations, mainly developing countries, soon followed suit. In the following decade, some Latin American states, such as Chile, Peru, and Ecuador, asserted sovereign rights over a 200-nautical-mile zone (Buzan 1976: 7, 10-11); most African and Eastern European countries

extended their territorial seas to 12 nautical miles; and Iceland unilaterally declared an Exclusive Economic Zone (EEZ) extending beyond its territorial sea amidst a series of “Cod Wars” in 1972. At the beginning of the LOS Conference in 1973, only 25 states maintained the traditional three-nautical-mile territorial sea (UN 1998).

The UNCLOS defines a 12-nautical-mile territorial sea within which states have exclusive sovereignty; states can also implement control rights and police power in a 24-nautical-mile contiguous zone (UNCLOS 1982: 27, 35). In addition, the Convention recognizes states’ jurisdiction over all resources to be found in the 200 nautical miles of EEZ and allows a coastal state to claim vast areas of continental shelf up to 200 or 350 nautical miles⁵⁰ (UNCLOS 1982: 44, 53). Because of these boundary-reinforcing provisions, more than one third of previously public spaces in the oceans are currently under the jurisdiction of sovereign states (Chen, B. 1992: 41; Yang, J. 1995: 6). The extended sovereign rights and jurisdiction reflected the demands of developing and small coastal countries but challenged the interests of maritime powers that sought to limit the control rights of coastal states to maintain the freedom of navigation, scientific research, and fishery (UNDOALOS⁵¹ 1998).

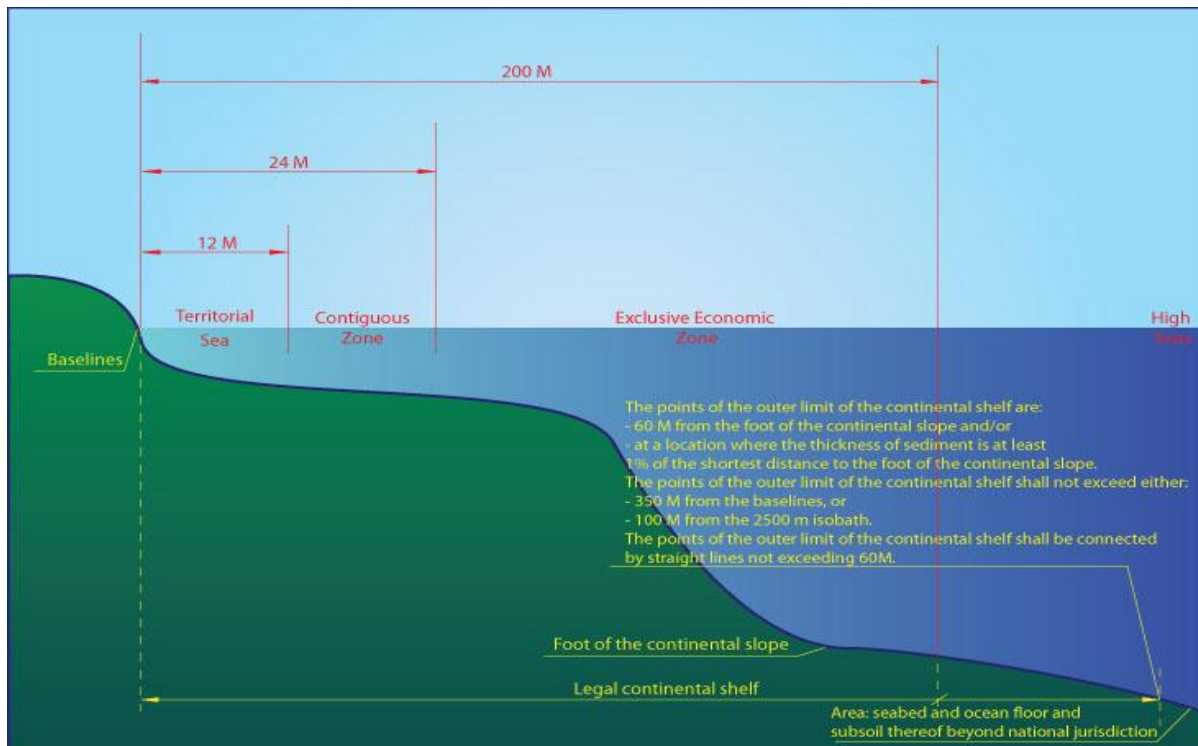
In order to gain the consent of great powers on the extended control rights of coastal states over new maritime zones, the UNCLOS incorporated a major boundary-trespassing clause of innocent passage, which grants ships of all states the right of innocent passage in the territorial sea of coastal states. Innocent passage means “continuous and expeditious” passage “not prejudicial to the peace, good order or security of the coastal State” (UNCLOS 1982: 30).

⁵⁰ The continental shelf of a coastal State comprises the seabed and its subsoil that extend beyond the limits of its territorial sea, throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 miles from the baselines from which the territorial sea is measured, where the outer edge of the continental margin does not extend up to that distance; in cases where the continental margin extends further than 200 miles, nations may claim jurisdiction up to 350 miles from the baseline or 100 miles from the 2,500 meter depth, depending on certain criteria such as the thickness of sedimentary deposits (UNCLOS: 53).

⁵¹ UNDOALOS stands for the Division of Ocean Affairs and the Law of the Sea of the United Nations.

Although during the negotiations, many coastal developing countries insisted that warships should be treated differently and not enjoy the same rights as ordinary ships, the UNCLOS does not distinguish warships from other types of vessels, thus satisfying great powers' demands for the freedom of navigation of their military fleets.

Figure 4.1: Maritime Zones



Source: United Nations Divisions for Ocean Affairs and the Law of the Sea
http://www.un.org/Depts/los/clcs_new/marinezones.jpg

The second revolutionary feature of the UNCLOS is the designation of the deep-seabed area—also defined as “the Area”—as the “common heritage of mankind” and the establishment of a “parallel system” of deep-seabed mining, combining both centralized and market-based approaches in exploring and exploiting ocean resources.

The deep-seabed mining regime in Part XI of the UNCLOS was the most heatedly debated section during the LOS Conference. The regime was established against the background of the

discoveries of polymetallic nodules in the Area in the late 1960s, which foreshadowed competition among developed countries. According to a UN official in the Division of Ocean Affairs and the Law of the Sea (DOALOS), the great powers' rivalry for seabed resources, based on the assumption that polymetallic nodules would soon be commercialized, was a direct trigger of the LOS Conference (Interview NY100501). Since developing countries did not have the capabilities to participate in the competition, they worried that valuable natural resources on the ocean floor would be depleted by industrialized nations, and therefore attempted to restrict great powers' mining activities in the Area. Developing countries preferred a centralized international authority in charge of exploiting seabed resources, while developed countries favored decentralized methods and tried to minimize the power of centralized authority.

The solution of Part XI of the Convention was to set up a "parallel system" bringing together both public and private parties to collectively exploit the "common heritage of mankind" (UNCLOS 1982: 26). Mining activities in the Area would be administered by an autonomous international organization—the International Seabed Authority (ISA)—and carried out by the Enterprise, an organ of the ISA, as well as by states and private companies. Individual states and companies would apply for licenses from the ISA, at the same time providing two potential mining areas. The ISA would choose one reserved area for the Enterprise to exploit and contract with applicants to allow them to carry out parallel activities in the other unreserved area. Moreover, contracted states and companies would have obligations to transfer technology and provide financial support to the Enterprise. In addition to Part XI of the UNCLOS, Resolution II of the Final Act of the LOS Conference also set up a "pioneer investor" regime, allowing states and companies that had already made certain amounts of investments to explore the polymetallic nodules before the entry into force of the Convention. However, when the UNCLOS was

adopted in 1982, major developed countries were still not satisfied with Part XI and refused to sign the treaty in the 1980s. It was not until the new Agreement Relating to the Implementation of Part XI was adopted in 1994—modifying Part XI and making further concessions to developed countries—that most industrialized countries started to accept and accede to the UNCLOS.

The third major innovation of the UNCLOS is at the procedural level. It sets up a compulsory DSM that entails binding decisions on sovereign states. States are obligated to submit certain types of disputes to international legal authorities at the request of any party to a dispute.

Article 287 of compulsory DSM stipulates that states are free to choose one or more of the following four institutes for dispute resolution: the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), an arbitral tribunal constituted in accordance with Annex VII, or a special arbitral tribunal for solving disputes related to fisheries, maritime environment, scientific research, and navigation (UNCLOS 1982: 131). The mandatory nature of the DSM lies in paragraph 3 of Article 287, which posits that “[a] State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII” (UNCLOS 1982: 131). That means that as long as a state ratifies the treaty, it automatically accepts the arbitration in accordance with Annex VII. Besides these general procedures, disputes over seabed mining activities are arbitrated by the special Seabed Disputes Chamber of the ITLOS. According to Article 186 of Part XI, the Chamber has compulsory jurisdiction over all seabed mining conflicts among sovereign states, the ISA, private companies, and individuals. Private parties and the ISA can bring cases against sovereign states,

and vice versa, to the Chamber for arbitration. Legal decisions made by any above court or tribunal are binding on states.

However, as the UNCLOS covers almost all ocean-related issues ranging from core to noncore sovereign control rights, binding compulsory DSM in all issue areas would have imposed high sovereignty costs and deterred many states from participating. In fact, a higher level of delegation does not necessarily mean a higher quality of cooperation, because there are tradeoffs between hard and soft laws. As Jana von Stein argues: “Relatively ‘soft’ law often garners widespread participation, but it creates few concrete incentives for states to improve behavior. ‘Harder’ commitments make shirking more difficult, but these institutional features may deter from joining the very states whose practices are least consistent with the treaty’s requirements” (Von Stein 2008: 243). Therefore, one important feature of optimally designed international institutions is to balance between legalization and flexibility (Koremenos, Lipton, and Snidal 2001; von Stein 2008).

In order to achieve the goal of “universality of participation,” the boundary-trespassing compulsory DSM of the UNCLOS is softened by the exclusion clauses of Articles 297 and 298. Under these two Articles, three types of disputes can be excluded from binding arbitration or adjudication, but are subject to *nonbinding* compulsory conciliation: first, disputes concerning coastal states’ jurisdiction over maritime scientific research in their EEZs and on their continental shelves; second, disputes concerning coastal states’ sovereign rights and jurisdiction over certain specific issues of fishery in their EEZs; and third, disputes concerning sea boundary delimitations or those involving historic bays or titles, *but not at the same time involving any unsettled disputes over continental or insular land territory* (UNCLOS 1982: 135-136). Moreover, Article 298 specifies three types of disputes that can be exempt from both binding and

nonbinding compulsory DSMs: first, disputes concerning sea boundary delimitations *involving concurrent consideration of unsettled disputes over continental or insular land territory*; second, disputes concerning military activities; and third, disputes in which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations (UNCLOS 1982: 136-137). Except for those exclusions, the UNCLOS does not allow any further reservations and requires states to accept the Convention as a “package deal.”

Because of the exclusion clauses, coastal states have been able to maintain great degrees of control rights and autonomy in the maritime zones under their jurisdiction, significantly reducing the sovereignty costs of the binding mandatory DSM. A UN official in the DOALOS acknowledged that the enforcement mechanism of the UNCLOS was not strong enough, but she also emphasized the need to sacrifice certain degrees of enforceability in exchange for universal participation in the Convention, which was one major aim of the LOS Conference (Interview NY090317). Although the hard law nature of the UNCLOS was softened by the exclusion clauses, the Convention is the first multilateral agreement with significant impacts on the international order that adopts a binding mandatory DSM. This practice was developed 12 years earlier than the WTO Agreement and 16 years earlier than the Rome Statute of the ICC, and represented a starting point for the legalization of multilateral treaties at the global level.

2. China’s Positions on the UNCLOS during the Third UN Conference on the LOS

During the negotiation of the UNCLOS, China aligned with developing countries, especially the Group of 77, to promote enlarged maritime zones under coastal states’ jurisdiction as well as a centralized seabed mining regime. China showed great enthusiasm during the LOS Conference and signed the treaty on the first day it opened to signatures in 1982. The two main themes of the Convention—“privatized” maritime zones and a seabed mining regime regulating the public

goods of the Area—were in congruence with China’s self-interests, sovereignty beliefs, and a revolutionary ideology of “anti-hegemonism” in the 1970s. However, China was not entirely satisfied with the UNCLOS and did not ratify the treaty immediately, opposing a number of high sovereignty-cost boundary-trespassing provisions as well as some preferential arrangements of the seabed mining regime that accommodated the demands of industrialized countries.

2.1 The UNCLOS and China’s Material, Sovereignty and Ideational Interests in the 1970s

For China, the most tangible material and sovereignty benefits available from the UNCLOS would be control rights over 12 nautical miles of territorial sea, a 24 nautical-mile contiguous zone, and a large area of EEZ and continental shelf.⁵² Before the Conference, China had made a declaration of only 12 nautical miles of territorial sea in 1958. As some Chinese scholars pointed out, compared with the old maritime regime, which allowed states to claim only three nautical miles of territorial sea, the newly envisioned maritime zones would greatly extend China’s sovereign rights and jurisdiction over offshore resources (Lan 1988: 34; Zhao, E. 1994: 2).

As for the deep-seabed mining regime, its main purpose was to regulate the mining activities of developed countries in the area beyond sovereign states’ jurisdiction. When China was weak and lacked capabilities to compete with industrialized countries in the 1970s, its leaders supported a more centralized authority and hoped to restrain the great powers from freely exploring and exploiting seabed resources. Major arrangements of the seabed mining regime—such as setting up rules and establishing the ISA to regulate states’ activities in making use of “public goods”—were in accord with China’s self-interests, which reflected China’s material capabilities and its relative position in the international system at that time.

⁵² As the area of ocean between China and many other Asian states is less than 400 nautical miles, China cannot gain entire 200 nautical-mile EEZs and continental shelves.

Moreover, because most developing countries promoted boundary-reinforcing sovereign rights while most developed countries advocated boundary-trespassing obligations of coastal states, the revolutionary ideologies of supporting the third world for a NIEO and anti-hegemonism also strengthened Chinese leaders' sovereignty beliefs and increased the normative premiums of sovereignty costs for China during the LOS Conference. China had actively participated in the Conference since 1973, two years after regaining its seat in the UN. At that time China was under Mao's leadership, and held a revolutionary view toward the international order. Chairman Mao advanced his famous "Three-World Theory" in 1974, dividing the countries of the world into three groups based on their political and economic status: the two superpowers of the United States and the Soviet Union belonged to the first world; the Center, such as European countries, Japan, Australia, and Canada, constituted the second; and the third world consisted of all developing countries in Asia, Africa, and Latin America (People's Daily 2006). This theory provided a general guideline for China's diplomacy in the 1970s: uniting with the third world, winning support from the second world, and fighting against the hegemonism of the two superpowers, especially the Soviet Union.

Through ideational lenses, Chinese leaders perceived the claims of the extended jurisdiction of coastal states over maritime zones as "legitimate rights and interests" of sovereign states and as a righteous struggle of the third world against the unjust old international order (UN 1974 vol. 2: 187; UN 1975: 20, 77; UN 1976: 59, 96, 110). As Premier Zhou Enlai said in a welcome banquet for Mexican President Luis Echeverría, who visited China in April 1973, "Latin American States take the lead to fight for the 200 nautical-mile maritime rights, and has greatly encouraged and inspired the struggle against maritime hegemonism in every Continent around the world ... The Chinese government and People will firmly support the just fight of Latin

American People” (quote from Zhou, Z. 1982: 47). Former Minister of Foreign Affairs Huang Hua also wrote in his memoir, “in the late 1960s and early 1970s, developing countries in Asia, Africa and Latin America took action to protect national sovereignty and ocean resources and fight against America’s and Soviet’s maritime hegemonism. They advocated 200-nautical-mile maritime rights, and the declaration of the deep-seabed area and resource as ‘common heritage of mankind’ ... Chinese delegation followed the general principle of supporting the just demands of developing countries, fighting against maritime hegemonism, and protecting our legitimate maritime rights, actively participated in the negotiation, and play a significant role at the LOS Conference” (Huang, H. 2007: 198-199).

Chinese delegates’ statements at the Conference were also in accordance with the ideational positions and general guidelines set up by top Chinese leaders. They described “the essence of the law of the seas” as a “struggle to defend the sovereignty, security and national resources of many medium-sized and small countries” (UN 1974 vol. 1: 109). For example, delegate Chai Shu-fun asserted in the 25th meeting of the LOS Conference:

It was the sovereign right of every country to define its territorial sea and the scope of its national jurisdiction. Coastal States were entitled to define a territorial sea of an appropriate breadth and, beyond it, their exclusive economic or fishery zones with appropriate limits in light of their specific conditions and the needs of their national economic development and national security (UN 1974 vol. 1: 80).

In contrast, China opposed all proposals of developed countries to maintain the rights of various activities in coastal states’ maritime zones, such as scientific research and fishery in EEZs and innocent passage of warships in territorial seas. Chinese delegates often criticized the “freedom-of-the-high-seas” principle as an outdated legal regime “based on colonialism, imperialism and hegemony” and characterized some developed countries’ efforts to limit the

control rights of coastal states as superpowers⁵³ pursuing maritime hegemony and monopoly (UN 1974: 80; UN 1975: 20, 98; UN 1976: 59).

Ideational factors also greatly influenced China's positions on the deep-seabed mining regime. Its delegation vigorously promoted a centralized seabed authority and believed that the ISA should be entitled to regulate all activities in the Area (UN 1975: 68; 1976: 65, 74). In the early periods of the LOS Conference, Chinese delegates strongly opposed the idea of a "parallel system" suggested by developed countries, denouncing such proposals as superpowers' attempts and "unjustified demands" to "partition and plunder the resources of the international seabed" (1976: 26; 74). Nevertheless, in order to satisfy the demands and ensure the cooperation of industrialized countries, China and most developing countries eventually compromised on the parallel system, accepting the combination of centralized and decentralized methods in exploiting seabed resources.

China in general held a very positive view on the UNCLOS, believing that the overall principles were in accordance with China's national interests and that the Convention represented a triumph of developing countries in establishing a new international maritime order. Therefore, China voted for and signed the Convention in 1982. As Chinese delegate Han Xu remarked in the 191st meeting of the LOS Conference when the UNCLOS was adopted:

The new Convention is quite an improvement on the old one. The new Convention has laid down a number of important legal principles and regimes for safeguarding the common heritage of mankind and the legitimate maritime rights and interests of all States and brought about a change in the former situation, in which the old law of the sea served only the interests of a few big Powers. This is conducive to the fight against maritime hegemonism, the establishment of a new international economic order, and the promotion of friendly cooperation and exchanges between the peoples of all countries (UN 1982: 102).

⁵³ China's criticisms were mainly targeted at the two superpowers during the LOS Conference, not at developed countries as a whole, as the Three World Theory suggests that the second world be viewed as "the Center" that should be won over rather than alienated.

2.2 Material and Sovereignty Costs of the UNCLOS for China

In spite of the tangible material benefits and important normative meanings of the UNCLOS, Chinese decision makers believed that the Convention still had “shortcomings and even serious defects in the provisions of quite a few articles” (UN 1982: 162). Three major substantive issues—innocent passage, delimitation principles, and the pioneer investment regime—and two procedural problems—mandatory DSM and reservation—imposed material and sovereignty costs on China and prevented China from ratifying the UNCLOS in the 1980s and the early 1990s.

2.2.1 Substantive Issues that Delayed China’s Ratification

In his final statement in the 191st meeting of the Conference, Delegate Han Xu summarized three major substantive issues of concern to China. First, “in the articles of the Convention relating to innocent passage through the territorial sea there were no clear provisions regarding the regime of the passage of foreign warships through the territorial sea” (UN 1982: 102).

Throughout the entire Conference, Chinese delegates had refused to grant military ships the rights of innocent passage in territorial sea, because they viewed the territorial sea as “an inseparable part of the territory of the coastal State” and warships in that area as a threat to China’s sovereignty and national security (UN 1974: 133). During the Cold War era, China’s external security environment was particularly adverse. As early as in the 1950s, when the Korean War broke out, President Truman sent the Seventh Fleet to the Taiwan Strait to prevent China from attacking Taiwan. This move forced the Chinese government to postpone indefinitely its military plan of reuniting Taiwan. This incident indicated that great powers’ warships, even in the high sea areas near China, could have great impacts and pose threats to China’s national security. Moreover, since the 1960s, the bilateral relationship between China

and the Soviet Union had deteriorated and the tension between the two countries had dominated Chinese security concerns in the late Cold War periods. During the LOS Conference, Chinese elites were especially alert to potential security threats from the Soviet Union, interpreting the similar stances of the USSR and the US on “freedom of navigation” as their shared intentions to pursue global hegemony. As Chinese delegate Ling Ching stated, “the ideas of ‘all ships’ and ‘free passage’ as advocated by the super-Powers were designed to enable their warships and nuclear submarines to cross the oceans of the world in implementation of their expansionist policies and their strategy of world hegemony” (UN 1974: 134). Therefore, the treaty provisions granting all types of ships the same rights of innocent passage in territorial seas imposed high sovereignty costs on China.

Second, the Chinese delegation thought that “the relevant provisions in the Convention also contain shortcomings as regards the definition of the continental shelf and the principle of delimitation of the exclusive economic zones and the continental shelf between opposite and adjacent states” (UN 1982: 102).

Although the UNCLOS legitimizes states’ control rights over the EEZ and the continental shelf, the extended jurisdiction of coastal states has also led to increased disputes among states regarding sea boundary delimitation. During the LOS Conference, coastal states advocated different delimitation principles in order to claim as many jurisdictional areas as possible. For example, China promoted the “principle of equity,” which generates from previous ICJ’s jurisprudence and considers the length of a state’s coastline in demarcation—states with longer coastlines will have larger areas of EEZ and continental shelf. However, Japan and some other Asian countries supported the “principle of median or equidistance line,” suggesting that states divide shared maritime zones equally along the median line. As states could not reach consensus

during the negotiation, treaty provisions regarding delimitation intentionally avoided mentioning any principle and thus do not provide clear guidance for demarcation. Articles 76 and 83 regarding delimitation of EEZ and continental shelf respectively stipulate that delimitation among states “shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution” (UNCLOS 1982: 52; 56). As the ambiguity of the language did not help in solving existing disputes and might cause future conflicting claims between China and Asian states, Chinese delegates considered those treaty provisions unfavorable to China.

Third, the Chinese delegation pointed out, “[R]esolution II of the Conference, governing preparatory investment in pioneer activities relating to polymetallic nodules, has done too much in the way of meeting the demands of a few industrialized nations and given them and their companies some privileges and priorities. We consider that inappropriate” (UN 1982: 102).

Part of the Final Act of the LOS Conference, Resolution II set up an interim “pioneer investment regime” before the entry into force of the Convention. It allows a state or consortia of mining companies that has made a certain amount of investments in seabed mining-related activities to register as a pioneer investor. Such status provides these investors with privileges to explore polymetallic nodules in a reserved mine site, as well as guaranteed contractor rights after the UNCLOS enters into force (UNCLOS 1982: 198-205). Compared with Part XI of the UNCLOS, which set up the parallel system, the pioneer investment regime made even greater accommodations to the interests of developed countries, because most entities that could meet the criteria of pioneer investors at that time were industrialized countries or companies from those countries. The Resolution explicitly listed eight entities as pioneer investors, including four states (France, India, Japan, and the Soviet Union) and four big consortia whose components

originated in eight industrialized countries (Belgium, Canada, West Germany, Italy, Japan, the Netherlands, the UK, and the US). Among those entities, only India is a developing country. Other developing countries intending to register as pioneer investors were required to meet a certain level of investment expenditures before 1 January 1985 (UNCLOS 1982:198-199).

Although China finally softened its positions on the parallel system of deep-seabed mining in the later stages of the LOS Conference, it accepted the system only as a “temporary arrangement.” It still intended to restrict the activities of developed countries in the Area and strengthen the power of the ISA and the Enterprise when negotiating the Part XI of the UNCLOS (UN 1979: 22; UN 1980: 21; 58; UN 1982: 161). As Resolution II made further concessions to industrialized countries in the interim period, Chinese delegates considered some privileges enjoyed by pioneer investors from those countries “inappropriate” and the resolution not completely in conformity with the provisions of the Convention (UN 1982: 102).

2.2.2 Procedural Issues that Delayed China's Ratification

In addition to those substantive issues, two major boundary-trespassing procedural problems imposed additional sovereignty costs and prevented China from ratification in the early period. First, Chinese leaders saw the mandatory DSM as contradicting state sovereignty. They preferred political to legal means in solving disputes among countries, insisting that sovereign states should be free to choose whether they would subscribe to the jurisdiction of the DSM and that state consent should be acquired before submitting any disputes to independent international legal authorities.

During the fourth session of the plenary meetings of the LOS Conference, which focused on the issue of the settlement of disputes, Chinese delegate Lai Ya-li elaborated the consistent positions of the Chinese government on this issue:

States should settle their disputes through negotiation and consultation on an equal footing and on the basis of mutual respect for sovereignty and territorial integrity. Of course, States were free to choose other peaceful means to settle their disputes. However, if a sovereign State were asked to accept unconditionally the compulsory jurisdiction of an international judicial organ, *that would amount to placing that organ above the sovereign State, which was contrary to the principle of State sovereignty...*

Since the question of the settlement of disputes involved the sovereignty of all States, the procedures to be followed must be chosen by States themselves. *If most States agreed to draft specific provisions on dispute settlement procedures, those provisions should not be included in the convention itself but should form a separate protocol so that countries could decide for themselves whether to accept it or not* (UN 1976: 24; italics mine).

The Chinese delegation's suggestion of constructing an optional protocol for compulsory dispute resolution followed a common practice of international treaties in solving the conflicts between state sovereignty and the enforceability of international law. By doing so, the sovereignty costs of a treaty can be significantly reduced and an otherwise highly legalized treaty will become a non-binding soft law to the states that do not accept the protocol. One widely accepted international agreement at the global level that adopt an optional protocol is the Convention Against Torture (CAT). China is a state party to this treaty but does not accept its optional protocol. When later participating in the Rome Conference for establishing the ICC in the 1990s, the Chinese delegation expressed similar stances towards the mandatory jurisdiction of the ICC, aiming to lower the sovereignty costs of the treaty by insisting on the principle of state consent and an optional protocol for mandatory DSM. Differently from the soft law nature of the CAT and the hard law nature of the Rome Statute, the UNCLOS keeps the sovereignty costs of the treaty at a balanced level by allowing states to exclude certain types of disputes regarding core sovereignty from the mandatory DSM.

Although the inherent values of noncore control rights are lower than those of core sovereignty, which can be exempted by applying the exclusion clauses of the UNCLOS, the normative premiums of delegating dispute resolution to legal authorities were still very high in

noncore issue areas for China, because Chinese leaders had held very strong sovereignty beliefs in all issue areas before the 1980s. As Chinese delegate Shen Weiliang stated in the 103rd meeting in 1978: “the submission of a dispute to the compulsory settlement procedure *must have the consent of the parties to the dispute*. That position *applies to all the articles* in the composite negotiating text concerning the settlement of disputes” (UN 1978: 67; italics mine). Shen’s statement indicated that China was unwilling to accept mandatory arbitration or adjudication even in noncore issue areas during the LOS Conference. The exclusion clauses could reduce the sovereignty costs of the UNCLOS only to the extent that enabled China to sign, but not ratify, the treaty in the 1980s.

The other procedural issue that concerned the Chinese delegation was the reservation clause of the UNCLOS. Article 309 of the Convention states that “no reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention” (UNCLOS: 140). In order to enjoy the benefits of the Convention, states must also take all the responsibilities and adopt the treaty as a “package deal,” and “[n]o State can claim that it has achieved quite all it wanted” (UNDOALOS 1998).

As the exclusion clauses of UNCLOS could not reduce the sovereignty costs to China’s satisfaction, Chinese delegates wanted more reservations to further minimize the sovereignty costs of participation, and “*would not agree to any article that did not permit reservation in actual practice*” (UN 1980: 21; italics mine). Delegate Shen Weiliang emphasized this position in the 135th meeting in 1980:

Since there might be very few reservations expressly permitted by other articles and since what were called exceptions were not reservations, the foregoing provisions were tantamount to preventing States parties from expressing reservation which would not be incompatible with the principles of the convention in respect of articles affecting their *essential rights and vital interests*. The provisions were therefore inappropriate (UN 1980: 23-24; italics mine).

Moreover, Chinese delegates repeatedly stressed the universality of participation as an important reason for the UNCLOS to allow reservations. They argued that as the new Convention covered a wide range of complicated problems, it was impossible to accommodate fully the interests of all states under different situations. “In order that the convention as a whole might be accepted by as many States as possible and that it might enter into force at an early date, it was entirely proper to permit limited reservations while maintaining the essential integrity of the convention” (UN 1980: 24; UN 1982: 32).

In addition to the aforementioned substantive and procedural issues that imposed material and sovereignty costs on China, the UNCLOS had not gained enough social legitimacy at the global level in the 1980s. In fact, there was considerable uncertainty about the future of the Convention. Because several major developed countries, such as the US, the UK, and Germany, were not satisfied with the Part XI of the seabed mining regime, they refused to sign the Convention. Instead, they passed domestic legislation and signed “mini-treaties” among themselves in order to carry out activities in the Area without being constrained by the Convention (Lan 1992: 58-59). The “go-it-alone” behaviors of great powers posed challenges to the authority of the UNCLOS and also influenced other countries’ policies towards the Convention. Since it was unclear that the UNCLOS could gain widespread legitimacy or enter into force in the near future, the normative premiums of sovereignty costs could not be lowered and Chinese elites did not feel that the timing was right for China to ratify the Convention.

3. China’s New Material Interests and the Rising Benefits of Ratification

The change in China’s approaches towards the UNCLOS started from its reevaluation of the benefits and costs of the deep-seabed mining regime. Although China had actively campaigned for a centralized seabed authority to regulate and restrain the activities of developed countries in

the Area during the LOS Conference, the adoption of the UNCLOS triggered Chinese elites' ambitions to build China into a great maritime power and to compete with developed countries in seabed mining activities. The pioneer investor regime of the UNCLOS thus provided legitimate means for China to pursue these new strategic interests. The increased material benefits of becoming a pioneer investor and gaining access to the Area partially offset some of the sovereignty costs imposed by boundary-trespassing provisions of the UNCLOS and increased the chance for China to ratify the treaty in the future.

The LOS Conference and the adoption of the UNCLOS in 1982 had aroused the “consciousness of the sea” (*haiyang yishi*) in Chinese elites. Having observed the increasing competition of offshore and deep-seabed resources around the world, they believed that China should participate in the competition to become a great maritime power in the coming century. For example, Chen Bingxin, who was the Deputy Director of the State Oceanic Administration and participated in several meetings of the Preparatory Committee for the ISA and ITLOS from 1987-1990, envisioned that the oceans in the world were experiencing historical and strategic changes: as the UNCLOS was adopted, competition and conflicts of delimiting sea boundaries and controlling marine resources would become more fierce and complicated, and marine high-technological industry would be a pivotal industry in the era of oceanic economy in the twenty-first century (Chen, B. 1992: 41). Chen predicted that oceanic development would surely become a rising and booming industry, and suggested: “our maritime economy should match our status as a maritime power in the next century” (Chen, B. 1991: 12).

Chinese elites had paid close attention to the development of the seabed mining regime and relevant activities of developed countries since the adoption of the UNCLOS. Gao Zhiguo, an

official of the State Oceanic Administration,⁵⁴ found that on the one hand, several developed countries had passed domestic legislation allowing their governments to grant private firms license to explore seabed resources without the Preparation Committee's⁵⁵ authorization; on the other hand, some of those countries had applied for the status of pioneer investor and competed for resource-abundant mining zones under the regime of the UNCLOS (Gao 1985). Among the four countries listed as pioneer investors in the Final Act of the LOS Conference, India was the first state formally registered to the Preparation Committee and acquiring an allocated mining location. This occurred because the area for which India applied was the only one in the Indian Ocean and did not overlap with any other countries' claims. Since the other three states had applied for adjacent and overlapping zones in the Pacific Ocean, the Preparation Committee had to resolve their conflicts before registering them as pioneer investors (Yu 1988: 33; Yu and Li, S. 1992a).

After Japan, France, and the Soviet Union were approved as pioneer investors in 1987, China submitted its application to the Preparation Committee in 1990. Because China's research activities on polymetallic nodules also took place in neighboring areas in the Pacific Ocean, if China did not take action to secure a legitimate mining zone under the pioneer investor regime, profitable areas with the richest resource deposits in the Pacific Ocean might be taken up by developed countries. In fact, China had begun scientific expeditions to the deep seabed and initiated planning for the research and development of polymetallic nodules in the mid-1970s. China's research ships had made more than ten expeditions in some areas of 2,000,000 km² around the mid and east Pacific Ocean before the 1990s (Wang, Z. 1993: 41; Li, H. 1994: 50).

⁵⁴ Gao Zhiguo is currently a judge of the ITLOS.

⁵⁵ The Preparation Committee is an interim institute for the preparation of the ISA and the ITLOS before the treaty entered into force. According to Resolution II, states needed to apply to the Preparation Committee for pioneer investor statuses before the establishment of the ISA.

In contrast to its previous defensive stance, as China's economic reform led to a rapid growth of national power and surging demands for natural resources, China became keen to apply for the status of pioneer investor and to make a long-term investment in seabed mining activities. Yu Chengyuan, a government official in the State Oceanic Administration, and Li Shiguang, a senior UN official in the Six Committee (Legal Committee) and consultant to China's State Oceanic Administration in the 1980s, elaborated three major strategic meanings for China to become a pioneer investor in a coauthored article. First, making pioneer investments in the Area would meet China's increasing demand for strategic resources and sustain the rapid development of China's economy. As polymetallic nodules in the Area contain abundant strategic materials, exploiting deep-seabed resources would become profitable for China in the long run. Second, in order to improve China's international status as a great power, which, according to the authors, was closely related to its technology and economic strength, China must carry out the grand strategy of ocean exploitation to safeguard its maritime rights and to break the monopoly of a small number of developed countries. Third, participating in pioneer activities would create a new, high-tech industry of deep-seabed mining and help to train experts in relevant fields. If China could grasp the opportunity and invest as early as possible, the technological gap between China and developed countries would be narrowed and China's competitiveness in deep-seabed mining industries would improve over time (Yu and Li, S., 1992b: 68).

Moreover, the cooling down of the zeal for deep-seabed mining around the world in the late 1980s and early 1990s reduced the entry costs for China to take a place in the field of ocean exploitation in the early stages. Since the mid-1980s, market demand for polymetallic nodules from the Area had declined, and deep-seabed mining had encountered great technological

difficulties. Experts predicted that commercialization of polymetallic nodules would not be possible until the twenty-first century (UNDOALOS 1998). Therefore, the intensity of competition over seabed resources had decreased and many private companies from developed countries had withdrawn from exploration activities due to the high costs and uncertain prospects of the future market. Such changes were nonetheless beneficial to China. Since the costs of deep-seabed mining are very high for most private companies and small countries, only great powers have incentives and capabilities to make long-term investments for strategic purposes.

Chinese elites believed that China could use its state power and take advantage of the UN seabed mining regime to secure a privileged position as a pioneer investor and gain benefits in the long run.⁵⁶ In an article explaining the necessity and feasibility for China to participate in exploring and exploiting deep-seabed resources, Wang Zhixiong, an official in the State Science and Technology Commission,⁵⁷ maintained that the level of investment during the stage of the feasibility study was not high compared with the future stage of exploitation. Although China at that time was still behind industrialized countries, it could accumulate experiences and improve technologies through pioneer activities. As Wang argued,

Now, it is the opportune timing for China to start the feasibility study. According to the ongoing development of exploring polymetallic nodules around the world, it is not until 2005 or 2010 that commercialized extraction will be possible. As long as China takes the opportunity to invest in the feasibility study for 10 to 15 years, we can catch up to the world process of exploiting polymetallic nodules in the seabed, and be prepared for future large-scale commercialized extraction at the international level (Wang, Z. 1993:42).

⁵⁶ According to Resolution II of the Final Act of the LOS Conference, for any developing state⁵⁶ or its nationals to be considered as a pioneer investor, it must have expended \$30 million before 1 January 1985 in pioneer activities and no less than 10 percent of that amount in an allocated pioneer location not to exceed 150,000 square kilometers. Pioneer activities consist of “undertakings, commitments of financial and other assets, investigations, findings, research, engineering development and other activities relevant to the identification, discovery, and systematic analysis and evaluation of polymetallic nodules and to the determination of the technical and economic feasibility of exploitation” (Final Act of the UNCLOS III: 199).

⁵⁷ The Commission’s name has now been changed to the Ministry of Science and Technology.

In August 1990, China's UN delegate, Li Daoyu, submitted an application to the Preparatory Committee, asking for the registration of the China Ocean Mineral Resources Research and Development Association (COMRA) as a pioneer investor (Xiao, H. 1991:23).⁵⁸ The Committee approved China's application and China became the fifth pioneer investor in March 1991 (Yu and Li, S. 1992b: 60; Xiao, H. 1991: 23). The COMRA, established on April 4, 1991, is an organization affiliated with the State Ocean Administration. Its aim is "to explore new mineral resources for [China], to promote the exploitation of deep seabed resources and the development of high and new technology industry, to safeguard the rights of [China] to exploit the resources in the international seabed and to make contributions to the exploitation and utilization of the resources for the mankind."⁵⁹ The COMRA signed the first 15-year contracts on exploiting polymetallic nodules in the deep seabed with the ISA on 22 May 2001.⁶⁰

The change in China's policy and strategies toward "pioneer investor" status removed one major obstacle for China to ratify the UNCLOS; and the tangible benefits China could gain from participating in the deep-seabed mining regime partially offset the sovereignty costs. As a retired senior UN official confirmed in an interview, the change in Chinese leaders' attitudes towards the seabed mining regime was the starting point for reevaluating the benefits and costs of the Convention. When China had neither demands nor advanced technology to exploit seabed resources, he argued, it naturally sided with developing countries and tried to restrain the great powers from doing so. Once China had become stronger and richer, its interests aligned more with developed countries; treaty provisions that were beneficial to developed countries and were

⁵⁸ China's application gained applause from the international society. The UN Under-Secretary-General gave praise to China, believing that China's decision boosted the morale of participants in the Preparation Committees. The presidents of those committees stated that China's application was a strong support to the Convention and the work of the committees. The Group of 77 endorsed China, because China's participation in pioneer investment represented the rising status of developing countries on the Committees (Yu and Li, S. 1992b: 68).

⁵⁹ <http://www.comra.org/english/eindex.html>.

⁶⁰ <http://www.isa.org.jm/en/scientific/exploration/contractors>.

opposed by China in the 1970s then became beneficial to China in the 1990s (Interview NY 100115).

However, the increased material benefits of becoming a pioneer investor with privileged access to the Area did not provide adequate incentives for China to ratify the UNCLOS in the early period; nor did new material interests alter Chinese leaders' sovereignty beliefs and the normative premiums of sovereignty costs, because it was still unclear whether the Convention could enter into force and take effect in shaping the international maritime order. Challenges to the legitimacy of the UNCLOS came mainly from developed countries, which were unsatisfied with the deep-seabed mining regime and attempted to go it alone, using domestic legislation and mini-treaties among themselves to set up more decentralized deep-seabed mining practices.⁶¹ Many other countries would not commit to the treaty without the support of these states, which were seen as critical for UNCLOS' legitimacy at the global level. When the legitimacy of the Convention is weak at the systemic level, states can selectively enjoy benefits and exercise rights granted by the Convention without bearing any substantive costs; boundary-trespassing treaty provisions would not have binding effects on states, nor would they become widely accepted norms and practices in the international society. Therefore, China was unwilling to take boundary-trespassing obligations that imposed sovereignty costs before the Convention gained widespread legitimacy around the world.

4. Social Legitimacy and China's Ratification of the UNCLOS

Although the increased material benefits of becoming a pioneer investor could offset some of the sovereignty costs, and the exclusion clause of the UNCLOS enabled China to exempt disputes regarding core sovereignty from mandatory DSM, Chinese elites still felt that the

sovereignty costs of ratification were not bearable if the majority of states in the international society did not commit to treaty obligations. The most important reference group that Chinese leaders used to gauge the social legitimacy of the Convention was the critical states of industrialized countries. When a renegotiated agreement regarding deep-seabed mining brought most developed countries on board and the ratification momentum of the international society reached the “tipping point,” Chinese decision makers believed that the new international maritime order emerging out of the UNCLOS had been established and the Convention would soon take effect in the international society. Accepting the social legitimacy of the UNCLOS lowered the normative premiums of delegating non-core control rights and thus led to China’s ratification of the Convention in 1996.

Even if the substantive values of non-core control rights are relatively low, the normative premiums of delegating non-core sovereignty can still be high if ratifying an international treaty and taking boundary-trespassing obligations do not have any significant social or normative meanings for states. For Chinese elites, the social legitimacy of the UNCLOS has two main sources: one is that major treaty provisions represent the interests and demands of developing countries and provides a legal foundation for new international maritime order; and the other is the support and cooperation of developed countries so that the treaty could take legal effect in reality. From the very beginning of the LOS Conference, China had allied with developing countries to promote enlarged maritime rights and the centralized deep-seabed mining regime. Chinese elites generally believed that the UNCLOS was a triumph of the third world’s collective efforts in opposing maritime hegemonism and establishing a new international maritime order. Almost all of the articles written by government officials and scholars in the Chinese Academic

⁶¹ For example, the US, the UK, Germany, and France signed the Agreement of Provisional Measures on Deep-seabed Polymetallic Nodules in 1982; and the US, the UK, Germany, France, Japan, Italy, The Netherlands, and

Journal Database from 1982 to 1996 highly praised the contributions of developing countries during the UNCLOS negotiation and attached great normative value to the treaty, viewing it as an “epoch-making milestone” and an “irreversible historical necessity” (see, for example, Xiang, K. 1982; Lai, P 1983; Dong, S. 1983; Zou, D. 1985; Lan, H. 1988; Xu, W. 1994; Zhao, L. 1994). For example, Zhou Xiaolin, who worked in the MOFA and later served on the Chinese UN delegation, wrote in an article, “Developing countries had made creative efforts and played significant roles in protecting their maritime rights, preventing great powers from monopolizing and abusing maritime resources, and enabling the oceans to benefit the entire human race during the third LOS Conference. ... Although the Convention is not perfect and some specific provisions even have major drawbacks, it in general reflects the international reality, accords with the interests and demands of majority of states; therefore it is a democratic and progressive legal documents” (Zhou, X. 1985: 31).

Although the third world’s contribution to the UNCLOS granted the Convention great legitimacy in Chinese elites’ eyes, without the cooperation of major great powers and developed countries, the social legitimacy of the treaty was still incomplete and the new international maritime order could only exist in theory. Since one major theme of the UNCLOS was to establish the seabed mining regime to regulate activities of developed countries in the Area, the compliance of industrialized countries was a necessary condition for the Convention to gain legitimacy at the systemic level. As Krasner points out, the degree to which developing countries could succeed in altering international regimes also depended on the attitudes and power of developed countries (1985: 7).

Although both Chinese government officials and academic elites spoke highly of the third world’s contribution to the UNCLOS and portrayed China as a strong supporter of the common

Belgium signed the Provisional Understanding on Deep-Seabed Issues in 1984.

cause of developing countries, they were fully aware that the establishment of the new international maritime order and the proper function of the UNCLOS required the endorsement of major developed countries. They did not think that the Convention would take effect in shaping the international maritime order and believed that China should not ratify the treaty in a rush if most industrialized countries stayed outside the treaty regime.

According to a Chinese UN delegate, because the UNCLOS was a comprehensive and complicated international law, it was unrealistic to precisely calculate the aggregated benefits and costs of all treaty provisions. Most of the time, the government needed to consider other countries' reactions to an international agreement to determine whether China should participate. When major developed countries rejected signing the UNCLOS, it was not clear whether the treaty could eventually enter into force and take effect in reality. "*Ratification at that time would be pointless and costly*. Therefore, we took a 'wait-and-see' (*guanwang*) stance and thought that 'the time was not ripe'; in fact, many other countries also took the same 'wait-and-see' stance before the entry into force of the Convention" (Interview NY090315).

Many Chinese legal experts also criticized the go-it-alone activities of developed countries and accused them as major saboteurs and obstacles for the UNCLOS to enter into force. For example, Li Yuguo, a government official in the Department of Treaties and Laws in the MOFA, wrote in an article, "American and a small number of developed countries refuse to sign the UNCLOS, and want to use their power to suppress the common will of the international society, resist the Convention and deny the principle [of common heritage of mankind]...The struggle about the principle and seabed regime will continue for a long time" (Li, Y. 1986: 86). On the other hand, Chinese elites all recognized the indispensable role of developed countries in establishing the new international maritime order. Two prestigious legal scholars—Zhou Ziya of

Shanghai Social Science Academy and Zhao Lihai of Peking University—pointed out respectively that the unilateral legislation of developed countries and the mini-treaties signed among them might supersede the seabed mining regime of the UNCLOS and render the Convention inconsequential (Zhou, Ziya 1987: 12); without the support of developed countries, the ISA could not possibly function properly and the goals of the UNCLOS would be hard to achieve (Zhao, L. 1991: 60; 1994: 62). Another law professor, Lan Haichang of Wuhan University, also stated, “If the UNCLOS cannot gain support from Western developed countries and the Commonwealth of the Independent States, even if it can enter into force, it will be the Convention of developing countries only. Yet, developing countries have neither money nor technology, it will be extremely difficult to ensure the proper function of the ISA” (Lan, H. 1992: 63).

Although the legitimacy of the Convention at the systemic level was not well established in the early period, it was the only comprehensive international agreement governing every aspect of maritime activities. The product of an arduous nine-year negotiation based on the unprecedented participation of more than 160 states, it sets up general principles and a basic legal framework for the new international order of the seas. Even developed states that were unsatisfied with the Convention did not intend to overthrow the whole framework. Most of them sought to change only specific sections and provisions governing seabed mining activities. As Gao Zhiguo from the State Oceanic Administration noted, when industrialized countries passed domestic legislation or signed mini-treaties, the documents stated that those measures were provisional until the entry into force of the Convention (Gao, Z. 1985: 48). A UN official in the DOALOS also stated in an interview that the UNCLOS was the product of a unique historical era closely related to the social, political, and economic conditions of that time; although states had

always been unsatisfied with certain treaty provisions and tried to modify the Convention, all changes had to be based on the legal framework of the Convention and could not fundamentally transform the nature of the treaty (Interview NY100430).

The most important breakthrough allowing the UNCLOS to gain support from developed countries was the renegotiation of the seabed mining provisions in Part XI. Aiming at universal participation, the UN Secretary-General convened a series of informal consultations from July 1990 to 1994 to address certain difficulties with the seabed mining regime raised by industrialized countries. There were three major changes in the international environment that facilitated the success of these consultation meetings. First, realizing that the UNCLOS would not take effect unless it could gain endorsement from most industrialized countries, developing countries wanted to make substantive concessions to accommodate the needs of industrialized countries. Second, because of technological difficulties and the high costs of seabed mining, the prospect of commercialization of mining products was not as promising as had been anticipated a decade ago. If few states and companies had the interest or capabilities to invest in deep-seabed mining, a stringent centralized regime restricting the activities of individual actors in the Area did not seem necessary. Third, the diffusion of market norms at the global level and the collapse of communist regimes in Eastern Europe had increased the popularity of decentralized mining principles and facilitated the convergence of values and interests between developed and developing countries since the end of the Cold War. Against this international background, the renegotiated Agreement Relating to the Implementation of the Part XI of the UNCLOS was adopted on 28 July 1994; more than the 1982 Convention had, it represented a new equilibrium reflecting the interests of industrialized countries.⁶²

⁶² For example, the Convention mandated that key articles of Part XI, including those on limitations of seabed production and mandatory technology transfer, would not be applied, and that voting of the Council of the ISA

When the international society renegotiated Part XI, Chinese elites also started to reevaluate the deep-seabed regime—partly because they realized that revising this section was the necessary condition for developed countries to accept the treaty and for the Convention to gain legitimacy at the systemic level, and partly because China had become the Pioneer Investor and changed its previous negative views on a decentralized seabed regime. For example, Wang Zonglai of the Department of Treaties and Laws in the MOFA wrote in an article, “Nowadays, it is critical to improve the seabed regime, conduct sincere renegotiation, and find acceptable alternatives for every party. Current international situation, including the changes of the international market and seabed exploiting activities, has created some conditions for [renegotiation] ... Judging from the current situation, no matter some countries are willing to or not, the revision of the Convention is inevitable” (Wang, Zonglai. 1992: 13, 15). Law professor Lan Haichang, of Wuhan University, also argued, “An ISA without the participation of major deep-seabed mining states is unimaginable, and a well-functioned international seabed regime must gain widespread support. In order to facilitate the entry into force and achieve the universality of the UNCLOS, revising the Part XI of the Convention is unavoidable” (Lan, H. 1992: 63).

As the consultation meetings proceeded, Chinese elites realized that once the obstacles for industrialized countries to access the UNCLOS were removed, it would soon gain support from both developed and developing countries around the world. Many Chinese elites had expressed the necessity and feasibility for China to ratify the Convention since the 1990s. Zhao Lihai, a famous legal scholar at Peking University and the first Chinese judge of the ITLOS, wrote a series of articles introducing major provisions of the UNCLOS and supporting China’s ratification in the early 1990s. In an article written just before the Convention’s entry into force,

would be done in groups, with each group able to block decisions on substantive matters. It also established a Finance Committee that would originate the financial decisions of the Authority, to which the largest donors would

Zhao predicted an emerging trend of ratification by industrialized countries and suggested that China should follow suit:

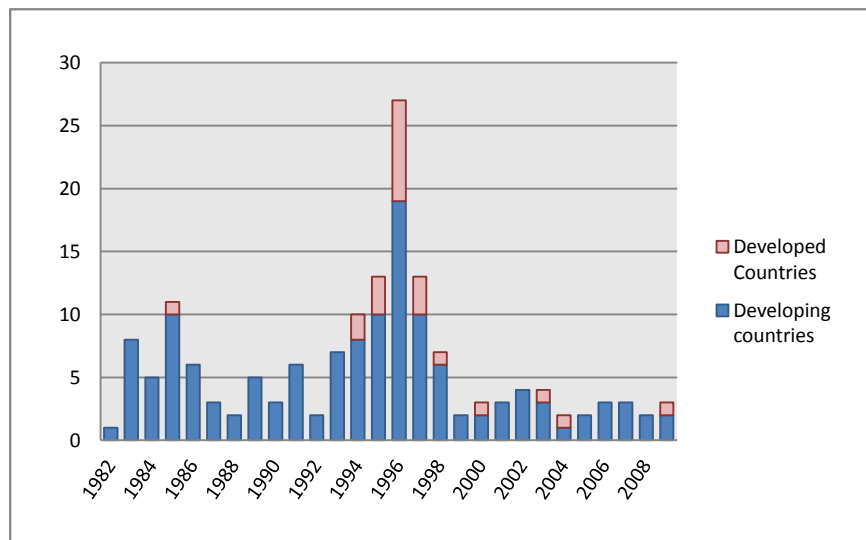
We should realize that 60 countries have already ratified the Convention; if the consultation about seabed mining can be successful and every party can reach an agreement on a reasonable and constructive seabed regime before the entry into force of the Convention, a large number of states will accede to the Convention. Germany will accept it because the ITLOS will be located in Hamburg, other members of the European Community will soon follow suit, and Australia, New Zealand, Canada and Northern European countries will all join the Convention one after another. ... At that time, it is natural and reasonable for China to ratify the Convention (Zhao, L. 1994: 62).

The timing of China's ratification of the UNCLOS was greatly influenced by the ratification momentum around the world. The year 1994 was the tipping point for the Convention to gain widespread legitimacy at the systemic level. During that year, the renegotiated Agreement Relating to the Implementation of the Part XI of the UNCLOS was adopted, and the Convention entered into force on 16 November, one year after Guyana became the 60th state to ratify the treaty.⁶³ These events triggered many states, including China, to speed up their ratification processes. As Figure 4.2 shows, since 1994, developed countries had gradually begun to ratify and accede to the UNCLOS;⁶⁴ from 1995 to 1997, ratification numbers increased dramatically and peaked in 1996, when China also ratified the Convention.

automatically be members and in which decisions would be made by consensus.

⁶³ Article 308 of the UNCLOS stipulates, "This Convention shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession" (UNCLOS: 140).

Figure 4.2: Number of Ratifications (1982-2009)



Source: the United Nations: http://www.un.org/Depts/los/reference_files/status2010.pdf

The tipping point of ratification momentum changed Chinese decision makers' perception of the social legitimacy of the UNCLOS and the emerging international maritime order. According to a Chinese official in the MOFA, "the entry into force of the UNCLOS signified that the Convention would soon take effect in reality, and that the formation of the new international maritime order based on the Convention would be inevitable; therefore, we considered the time was ripe for ratification" (Interview BJ080503). At a press conference on 17 November 1994, in response to a reporter's question about how China evaluated the significance of the entry into force of the UNCLOS, a press spokesman of the MOFA stated,

The entry into force of the 1982 UNCLOS is an important event in the development of modern international law. The UNCLOS established a whole set of legal frameworks covering almost all aspects of maritime law; it is an important codification and progressive development of traditional maritime law. *We firmly believe that the Convention will have profound impacts on the international maritime regime.* China has actively participated in the legislation of the Convention from the very beginning and has also signed the Convention. *At the current stage, we are following our domestic*

⁶⁴ Before the UNCLOS entered into force, Iceland was the only developed country ratifying the Convention.

legal procedures to prepare for the ratification of the Convention (Gazette of the State Council: 1102; italics mine).

Recognizing the social legitimacy of the UNCLOS reduced the normative premiums of sovereignty costs in non-core issue areas; delegating dispute resolution regarding non-core control rights to international legal authorities was no longer considered particularly costly for China. As the aforementioned MOFA official stated in an interview, since China had excluded all “*sensitive domains*” (*mingan lingyu*) by applying the exclusion clauses, the mandatory DSM had jurisdiction mainly in “*low-sensitive domains*” (*di mingan lingyu*). In practice, the ITLOS and arbitration tribunals had not yet taken any cases involving critical interests of states; therefore the negative impacts of the DSM on China’s sovereignty were not significant (Interview BJ080503). A Chinese UN delegate expressed similar opinions: given that major provisions of the UNCLOS were favorable to China and China’s core national interests were not hurt, “if most states had already ratified the Convention, China as a member of the international society should also do so” (Interview NY100321).⁶⁵ That statement indicated that once Chinese elites accepted the social legitimacy of the UNCLOS, they took for granted boundary-trespassing obligations regarding non-core sovereignty. Therefore, China joined the mainstream of the international society, ratified the UNCLOS in June 1996, and became the 92nd state party of the Convention.

5. Core Sovereignty and China’s Reservations to the UNCLOS

Although accepting the social legitimacy of the UNCLOS reduced the normative premiums of sovereignty costs in non-core sovereign issue areas for China, it did not weaken Chinese elites’ beliefs in the Westphalian norm or lower the normative premiums regarding China’s core sovereignty. On the contrary, the boundary-reinforcing provisions of the UNCLOS have

intensified the competition for resource-abundant maritime zones among Asian states and strengthened the sovereignty beliefs of Chinese elites regarding territorial and jurisdictional sovereignty. Because of the awakening of the “consciousness of the seas,” China passed domestic laws to legalize its control rights over maritime zones granted by the UNCLOS. Moreover, China’s firm stances toward several boundary-trespassing treaty provisions that may have negative implications on its territorial sovereignty have never softened since its participation in the LOS Conference. By applying the exclusion clauses and making declarations, China exempts disputes regarding core sovereignty from the binding mandatory DSM, denies the rights of innocent passage for warships in its territorial sea, and thus minimizes the sovereignty costs of the UNCLOS in core sovereign issue areas.

5.1 The Rising “Consciousness of the Seas” and China’s Domestic Legislation

The treaty provisions regarding the extended sovereign rights of coastal states have had substantive impacts on state sovereignty and greatly reshaped the contour of the international order of the seas since the UNCLOS opened to signature. Most coastal states had claimed territorial seas, contiguous zones, EEZs and continental shelves, and taken actions to seize islands and reefs even before the treaty entered into force. A negative effect of the Convention is that it has triggered a new “enclosure movement” over the seas among many coastal states (Ji 1992: 6; Liu, Z. 2008: 82). For example, the Convention stipulates that if an island is large enough and suitable for residence, it can also have its own 200-nautical-mile EEZ. Such provisions have led many states to compete for sovereignty over previous inconsequential islands, so that they can claim larger areas of EEZ. Moreover, as states could not reach consensus on demarcation principles during the LOS Conference, some treaty provisions

⁶⁵ A UN official in the DOALOS also confirmed that since most states would soon become states parties, there was no reason for China to stay outside the regime (Interview NY100321).

regarding delimiting sea boundaries are ambiguous and may be subject to different interpretations. Therefore, many coastal states try to maximize their own sovereign rights, claim as many jurisdictional areas as possible, and interpret treaty provisions in their own favor.

Starting from the 1970s, some Southeast Asian states have claimed sovereignty and taken control of many islands in the South China Sea, over which China has also claimed sovereignty for many years. In the East Sea, the disputes between China and Japan over the Diaoyu (Senkaku) islands, the EEZ, and the continental shelf often cause tensions between the two countries. Some Chinese elites realized that because the breadth of the ocean areas between China and several Asian countries was less than 400 nautical miles, it was impossible for China to gain the entire 200-nautical-mile EEZ and continental shelf in many regions; how much control rights China could gain depended on its ability and efforts to defend its “oceanic territories” (*haiyang guotu*) (Xu 1988: 18; Liu, R. 1995: 45). Xu Senan, an official of the Research Institute for Oceanic Developmental Strategy of the State Oceanic Administration, worried that many Chinese were not aware of the importance of the sea. He maintained that according to the UNCLOS, China could claim three million square kilometers of sovereign and jurisdictional zones; but given the conflicting claims among Asian countries, if China did not make enough effort, it would not even get one million square kilometers in reality (Xu 1988: 18). Therefore, Xu suggested that Chinese people should pay attention to the seriousness of the situation, be farsighted, and actively strive for China’s rights over maritime zones (Xu 1988: 20).

In fact, Chinese elites did not have much “consciousness of the sea” until participating in the LOS Conference. It is ironic that as a strong advocate of state sovereignty, China did not even have a domestic law on territorial seas and contiguous zones until 1992, nor did it have legislation on the EEZ and continental shelf until 1998. The sovereign claims over disputed areas

from neighboring Asian countries and the rising trend of domestic legislation on states' sovereign rights over maritime zones around the world aroused Chinese elites' awareness in the 1980s and early 1990s. They realized the necessity and the urgency of making domestic laws to clearly define China's control rights over maritime zones and the boundaries of its jurisdictional areas. For example, Zhou Zhonghai, a legal scholar who participated in several sessions of the LOS Conference as a consultant to the Chinese delegation, pointed out that China's ocean-related legislation was inadequate to protect its political and economic interests and exercise its control rights over the seas; China should declare the baseline and boundaries of its territorial sea, contiguous zone, EEZ, and continental shelf, and make laws to effectively regulate all kinds of activities within those areas (Zhou Zhonghai 1986: 47).

Without domestic law to formally legislate the sovereign and jurisdictional rights granted by the UNCLOS, China could not legitimately claim its rights and compete with other Asian states over disputed maritime zones; nor could it punish crimes even in its own territorial sea. One important reason that China started its domestic legislation process to internalize the boundary-reinforcing treaty provisions of the UNCLOS was to regulate increasing excessive exploitations and illegal activities of foreigners in its maritime zones. According to Miao Lin, a member of the Standing Committee of the National People's Congress (NPC) participating in the legislation of China's Law on Territorial Sea and Contiguous Zone, "since we have no basic law, some countries have taken the opportunity to aggressively exploit ocean resources in our jurisdictional areas, and even discharge pollutants, catch fish abusively, and salvage wrecked cargo illegally in our territorial sea; moreover, smuggling, tax evasion and other crimes cannot be effectively and promptly punished and cracked down" (Miao 1992: 11).

Besides the serious situations China was facing in its own jurisdictional areas, the rising trend of domestic legislation on maritime zones in the international society also made Chinese elites realize that China had not taken enough action to defend its sovereignty in practice. China had already been left behind by most states in the world and needed to keep up with the trend in order to effectively exercise its control rights. As Yan Hongmo, the Director of the State Oceanic Administration taking charge of the legislation on China's territorial sea and contiguous zone, reported to the NPC about the draft law in an NPC's review session,

The worldwide struggles for sovereign rights over the seas in recent decades have triggered domestic legislations of coastal states in the world. More than 50 countries set up laws of territorial sea during the Third UN Conference on the LOS. So far, over 80 countries among the total of more than 130 coastal states have defined territorial sea by domestic laws. ...We have large areas of the seas; only by formally defining our sovereign and jurisdictional rights by law, can we effectively defend our maritime rights and adapt to the international situation of the struggles over maritime rights (Yan 1992: 72).

The internalization of the boundary-reinforcing provisions of the UNCLOS through domestic legislation has further strengthened Chinese elites' beliefs in the Westphalian norm regarding territorial and jurisdictional sovereignty and made them less likely to compromise on claims over offshore islands and maritime zones. After the NPC passed the Law of the People's Republic of China on Territorial Sea and Contiguous Zone in 1992, China also speeded up domestic legislation on the EEZ and continental shelf. At the end of 1996—about six months after China ratified the UNCLOS—Vice Minister Li Zhaoxing of the MOFA presented the draft law on EEZ and continental shelf for the NPC to review. As Li stated, “At the current stage, neighboring states that are adjacent and opposite to our country have made laws, government decrees or government declarations on the EEZ and continental shelf. In order to facilitate the solution of sea boundary delimitation with neighboring countries, it is urgent that we make the law and establish our claims over the EEZ and continental shelf within the scope prescribed by

the Convention” (Li, Z. 1996: 278). Against the background of the entry into force of the UNCLOS and rising competition among Asian states, the NPC passed the Law of People’s Republic of China on EEZ and Continental Shelf in 1998, two years after China’s ratification of the Convention.

5.2 China’s Reservations to the UNCLOS

Because of the relatively stable sovereignty beliefs of Chinese leaders in core sovereign issue areas and the fierce competition among Asian states over ocean resources and maritime zones, delegating territorial disputes to international legal authorities will impose high sovereignty costs on China. Chinese decision makers in general prefer political to legal means in solving all types of international disputes, because they consider the flexibility and quid pro quo of political methods superior to rigorous legal principles and procedures. As an MOFA official said in an interview, legal experts usually did not have broad political perspectives and tended to see things through mainly legal points of view. Legal means of solving disputes were likely to create clear winners and losers, and the losing side might not gain anything to compensate their losses. However, political negotiation, albeit slow and complicated, could include all important issues at once and was usually based on compromise of every party involved. One side might lose on one aspect but gain on others: no one was an absolute loser or winner in political negotiation (Interview BJ080505).

That being said, Chinese elites have been more open to mandatory dispute resolution in non-core than in core sovereign issue areas. Since both the inherent values and the normative premiums of non-core control rights are lower, the sovereignty costs of losing a case in non-core issue areas will not be as unaffordable as the consequences of losing a territorial dispute in international arbitration or adjudication. When asked why China had accepted some international

treaties with mandatory DSMs regarding non-territorial disputes, such as the UNCLOS, the WTO Agreement and the BITs, but rejected the delegation of territorial disputes to international legal authorities, the above mentioned MOFA official replied, “we have indeed become more flexible on dispute resolution recently, especially regarding economic disputes; but the nature of economic and territorial issues are essentially different: *economic disputes are mainly about money; even if we lose, we lose at most some money; while territorial sovereignty had more meanings and cannot be measured by money; so we cannot bring territorial disputes to mandatory DSMs*” (Interview BJ080505).

Another MOFA official also confirmed in an interview that China preferred political to legal means in solving conflicts over core sovereignty, because international courts or arbitration tribunals would make decisions mainly based on legal standards without taking adequate account of political factors. Nevertheless, territorial disputes are essentially political issues requiring political considerations; therefore, mandatory DSMs were not suitable for solving disputes with high political stakes (Interview BJ080528). When further asked why some states had submitted disputes over sea boundary delimitation to international legal institutes, he pointed out that most of those disputes were about small islands or ocean areas without much economic and strategic values. The stakes of losing or winning those cases were not too high.⁶⁶ But the disputed islands and maritime zones between China and other Asian countries have significant economic and strategic meaning for China; China could not unconditionally accept compulsory DSM over those disputes (Interview BJ080528).

Given that both the inherent values of the control rights over resource-abundant maritime zones and the normative premiums of delegating disputes regarding core sovereignty are high,

Chinese decision makers cannot afford losing such cases in international arbitration or adjudication. Political negotiation can ensure that China will not make concessions as long as the situation is not extremely dire; and even if concessions are necessary, it will have gains and compensations on other important issues. Nevertheless, if it allows international legal authorities to adjudicate disputes, China will lose control over the process and the consequences will be uncertain. Therefore, China made a formal declaration to exempt all disputes allowed by the exclusion clauses from the binding compulsory DSM on 25 August 2006: “The Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention”⁶⁷ (UN 2010).

Besides the mandatory DSM over core sovereignty, China’s positions on the navigation rights of warships in its territorial sea have remained unchanged since the beginning of the LOS Conference. Although China’s external security environment has improved greatly since the end of the Cold War, Chinese elites still perceive the presence of warships in its territorial sea as a potential threat to China’s national security; they believe that China has the sovereign rights to legislate the navigation of foreign military ships on its own territory. According to an article written by Zhu Jianye, a legal expert in China’s Central Military Commission, since military ships belonged to a country’s armed forces and it was often impossible to differentiate innocent passage from reconnaissance, intelligence, and other military activities in practice, warships in a territorial sea would pose threats to the sovereignty and security of coastal states. Moreover, China’s territorial sea did not cover any necessary international navigation routes and was

⁶⁶ It was not clear whether states submitting disputes to international legal institutions really thought the economic and strategic values of those territories were not very high; the statement of the interviewee reflected how he and some other Chinese government officials *interpreted* the reasons and meanings of other countries’ actions.

situated amidst vast areas of high seas; warships had no “innocent” need to pass through China’s territorial sea (Zhu, J. 1993: 17).

China’s opposition to the innocent passage of warships was formally institutionalized in its 1992 Law on Territorial Sea and Contiguous Zone. As Article Six states, “foreign warships must get authorization of the government of the People’s Republic of China before entering into China’s territorial sea.”⁶⁸ During the law making processes, Chinese elites also referenced other countries’ legislation practices. According to Wang Liyu, a government official in the Research Institute for Oceanic Developmental Strategy of the State Oceanic Administration, before 1990, there had already been 48 countries imposing restrictions on warships in territorial seas, 31 of which had made relevant domestic laws during or after the LOS Conference (Wang, L. 1992: 51). Yan Hongmo, Director of the State Oceanic Administration, also noted in his report on the draft law to the NPC that there had been three types of practices regarding the passage of warship in territorial sea around the world: innocent passage, prior notification, and prior authorization (Yan 1992: 74). China’s legislation eventually followed the most stringent practice, requiring foreign warships to gain authorization for passage through its territorial sea, because this practice incurs the fewest sovereignty costs on China.

The Article on the passage of warships in China’s domestic law is not entirely compatible with the rights of innocent passage stipulated in the treaty provisions of the UNCLOS. Nevertheless, Chinese elites generally held the view that China could reconcile its domestic law with the UNCLOS by making a declaration upon ratification according to Article 310 of the Convention. Although Article 309 does not permit any reservations to the Convention, Article 310 allows states to make declarations or statements to “[harmonize] its laws and regulations

⁶⁷ Paragraph 1 (a) (b) and (c) of Article 298 refers to disputes concerning (a) sea boundary-delimitation, (b) military activities, and (c) disputes in respect of which the Security Council is exercising functions.

with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State” (UN 1982: 140).

In fact, during the LOS Conference, China had not been very satisfied with either Article 309 or 310 of the reservation clauses. Chinese delegates voted for Turkey’s amendment to Article 309, which required deleting this Article (UN 1982: 133, 226); they also expressed support for Romania’s Amendment to Article 310, which suggested that the Article use a vague expression allowing declarations or statements without emphasizing the precondition that “such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State” (UN 1982: 121, 223). These positions in the early 1980s indicated that although Chinese delegates intended to make reservations to minimize sovereignty costs, they also suspected that those reservations would constitute exclusions or modifications of the Convention and thus contradict the provisions of the reservation clauses.

Nevertheless, such doubts were soon dismissed when Chinese elites realized that in practice, many countries had invoked Article 310 and made declarations upon ratification to express their reservations to the rights of innocent passage. They interpreted Article 310 as a loosening of the non-reservation obligation stipulated in Article 309 and believed that China could follow the practices of other countries, making use of the Article to harmonize China’s domestic law with the Convention. For example, in an article by Zhao Lihai, the first Chinese judge of the ITLOS, he asserted: “[Article 310] provides a way out for us ... We can also make a declaration when ratifying the Convention to explain our positions on innocent passage, so as to avoid falling into a passive position when dealing with concrete problems in the future” (Zhao 1994: 60). That is

⁶⁸ The Law on Territorial Sea and Contiguous Zone of the PRC. http://www.law-lib.com/law/law_view.asp?id=227.
196

what China has done. When China deposited the instruments of ratification to the United Nations in 1996, it included the following declaration:

The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State (UN 2010).

6. Conclusion

The evolution of China's policies shows that the changes in China's material interests and the increasing legitimacy of the Convention led to China's ratification of the UNCLOS in 1996. When China lacked the incentives and capabilities to participate in the competition over deep-seabed resources, its leaders preferred a centralized seabed mining authority to regulate developed countries' activities in the Area; but as China's national power and the demands for natural resources grew rapidly after its economic reform, China's interests became more aligned with those of developed countries. The increased material benefits of becoming a pioneer investor could partially offset the sovereignty costs of the UNCLOS and increased the chance for China to accept the social legitimacy of the Convention. When major developed countries and most states in the world showed their support for the UNCLOS, the tipping point of the ratification momentum changed China's external social and institutional environment. Chinese elites accepted the social legitimacy of the UNCLOS, believing that the Convention would soon take effect and become a legal foundation of the emerging international maritime order.

However, recognizing the social legitimacy of the UNCLOS had divergent effects on the sovereignty costs of core and non-core control rights: it lowered the normative premiums in non-core issue areas, but reinforced the Westphalian beliefs of Chinese elites regarding core sovereignty. Chinese leaders had been more willing to take on boundary-trespassing obligations

regarding non-core control rights, whose sovereignty costs are relatively low. Nevertheless, because the sovereignty costs of compromising on territorial and jurisdictional control rights are high, Chinese leaders have been set against boundary-trespassing obligations that encroach on China's core sovereignty since the very beginning of the LOS Conference. Only by exempting high-stake disputes from the mandatory DSM and making declarations to insist that warships get approval for passage in China's territorial sea were Chinese decision makers willing to ratify the UNCLOS and follow the mainstream of the international society.

Chapter Five

Conclusion

This dissertation examines the conditions under which China is likely to accept institutional constraints on sovereignty and ratify international treaties with mandatory dispute settlement mechanisms (DSMs). In comparison to non-binding soft institutions and laws, treaties with mandatory DSMs have hard law features and encroach more on state sovereignty; therefore, they are better settings in which to gauge the depth of states' integration with the international society and to differentiate the relative weights of material and ideational factors in driving the boundary-trespassing changes of individual states.

There are two primary findings of this study: first, although China has continuously deepened its integration with international institutions, the sovereignty norm still plays an important role in determining its interests and identity. Changes to China's approaches to legalization are more likely if its core sovereignty of jurisdictional and territorial control rights is not at stake. Accordingly, China delegates disputes only in non-core issue areas, where sovereignty costs are relatively low—not in core issue areas, where such costs are deemed too high. Second, the primary driving force for China's changes regarding non-core control rights is the evolution of its new strategic interests, which increases the material benefits and partially offsets the sovereignty costs of signing and ratifying hard laws; meanwhile, China's acceptance of the social legitimacy of an international treaty or boundary-trespassing norm incrementally lowers the normative premiums of delegation and complements the material factors in driving changes. However, as China is still in a weak socialization process and has not fully internalized or accepted the normative legitimacy of alternative boundary-trespassing norms, the normative

premiums of deviating from Westphalian sovereignty cannot be significantly reduced, and China cannot accept highly legalized treaties without making reservations to lower the sovereignty costs.

The theoretical and empirical findings of this dissertation can be generalized in three dimensions. First, the logic of changes and continuities in China's approaches to sovereignty and legalization does not apply only to the settings of hard laws, but can also help us to understand China's behavioral patterns and strategies for negotiating, signing, and ratifying international treaties in general, including soft laws in a variety of issue areas. Second, this logic does not apply only to the specific periods of the 1990s and early 2000s, but can help us to understand and predict the evolution and continuities of China's policies on international law in the most recent decade and in the future. Third, the theory of sovereignty costs and the three mechanisms driving boundary-trespassing changes discussed in Chapter One are not China-specific, but can be used to analyze the natures of changes and continuities in other countries' approaches to sovereignty and international law.

In the following parts of this chapter, I will first broaden the case selections and test the generalizability of some of my findings regarding China's approaches to sovereignty costs in several other international treaties. Second, I will further examine the most recent developments in China regarding the three types of hard law examined in the empirical chapters, evaluating whether the arguments developed in this dissertation still hold over time. Finally, I will briefly discuss the possibility of broadening the scope of this research in the future by comparing China with other countries, such as EU states, which have entered into higher socialization stages and internalized boundary-trespassing beliefs more thoroughly than China has.

1. China's Behavioral Patterns in Sovereignty and International Treaties

Although this dissertation focuses on China's decision-making on signing and ratifying hard laws, some of the arguments and behavioral patterns generated from the hard law cases can also apply to the soft law setting. This section will use the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol; the Comprehensive Nuclear-Test Ban Treaty (CTBT); and the United Nations Framework Convention on Climate Change (UNFCCC), along with its Kyoto Protocol, to examine the generalizability of the findings. Those treaties cover human rights, security, and environmental issue areas respectively. As the CAT, CTBT, UNFCCC and Kyoto Protocol have certain boundary-trespassing features, but do not grant mandatory jurisdiction to international legal authorities or incorporate only limited compulsory enforcement mechanisms, they can be viewed as soft laws; the Optional Protocol of the CAT has more boundary-trespassing and mandatory features and thus resembles a high-sovereignty-cost hard law.

Prior literature on China and the world has provided detailed analysis on how and why China's policies on the three types of treaties evolve over time. Some studies treat both material and normative factors as playing important roles in driving boundary-trespassing changes (Kent 1999, 2007; Foot 2000), while others view socialization effects as the primary cause (Johnston 2008). Since soft laws are less intrusive to state sovereignty and impose less sovereignty costs than hard laws, the Chinese government tends to be more open and willing to heed the voices of domestic intellectuals, NGOs, and the international society: the influences of domestic and transnational social actors are more obvious in soft law-related issues. Nevertheless, that does not mean that social and normative forces have been strong enough to lead China to a strong socialization process. In fact, China has always tried to promote flexible treaty arrangements,

such as exclusion clauses, opt-in mechanisms, and reservations, to exempt its core sovereignty and minimize the potential sovereignty costs of international treaties. China's reservations and its opposition to "hardening" soft laws indicates that boundary-trespassing norms cannot significantly lower the normative premiums for China to cede sovereign control rights, and that China is still in a weak socialization process, unwilling to accept strong binding treaty obligations with high sovereignty costs.

Given the existence of detailed analysis on each type of treaty in prior literature, this section will not give a full-fledged examination, but a brief review of China's approaches to the three different treaty regimes. It tries to emphasize China's reservations and the weak socialization effects, which apply to both hard and soft law settings, but are not the focus of prior literature. Moreover, the three soft law cases demonstrate that the explanatory power of the theory developed in this dissertation increases especially when certain treaty provisions of a soft law exhibit hard law features, or when a soft law is moving towards hard law in subsequent renegotiation processes.

1.1 China's Positions on the CAT and its Optional Protocol

The CAT was adopted by the United Nations General Assembly on 10 December 1984. It requires states to take effective measures to prevent torture within their borders, and forbids them to transport people to any country where torture may happen. The CAT itself is a soft law without significant mandatory and boundary-trespassing features, because the "opt-in" mechanism and reservation clause allow states to voluntarily choose whether to accept the authority of the Committee Against Torture, a monitoring group established by the CAT. The CAT requires states' parties to report to the Committee every four years on the measures they have adopted to implement the treaty, and Article 20 allows the Committee to investigate reports

of torture on its own initiative through confidential inquiries and fact-checking missions in a state's territory; but states parties have no obligations to accept the authority of the Committee and the Committee's conclusions and suggestions are non-binding for states. As Paragraph 1 of Article 28 of the Convention states, "Each State may, at the time of signature or ratification of this Convention or accession thereto, *declare that it does not recognize the competence of the Committee provided for in article 20*" (UN 1984: Italics mine). Moreover, the CAT adopts an "opt-in" mechanism, which ensures that the Committee Against Torture can take certain boundary-trespassing actions only when a state party *pre-consents* to its authority. For example, Articles 21 and 22 allow the Committee to investigate potential violations of the Convention based on information and reports submitted by other states and individuals, *provided* the allegedly violating state has declared its acceptance of the Committee's competence; otherwise, it has no right to investigate.

In fact, without the reservation clause and the opt-in mechanism, the rights of self-initiation of a Committee investigation would have resembled the *ex officio* rights of the Prosecutor of the ICC—one important factor that prevents China from signing the Rome Statute—and the CAT would have had more hard law features and imposed higher sovereignty costs on states. Nevertheless, even if the CAT does not incorporate any flexible arrangements, the legalization and boundary-trespassing features of the treaty cannot compare to those of the Rome Statute. The Committee against Torture is mainly a monitoring group with the right to investigate violations. It cannot function as a court, which has legal authority to adjudicate a case, try a suspect, and make legally binding decisions, as the ICC does.

China signed the CAT in 1986, two years after the treaty was adopted, and ratified it in 1987, one year after it entered into force. Why did China accept the CAT in the very early period

of its economic reform, but reject the Rome Statute even after its integration with international institutions had greatly deepened in the 1990s? The primary reason can largely be attributed to the different degrees of legalization and boundary-trespassing features of the two treaties. Neither treaty provides direct material incentives to states, and China's acceptance of the legitimacy of human rights norms was even greater in the 1990s than in the 1980s. But had the Rome Statute adopted the opt-in mechanism of "state consent" advocated by Chinese delegates, China would have voted for the treaty and recognized its social legitimacy. It was because the flexible arrangements of the CAT transformed an otherwise high-cost treaty into a relatively innocuous soft law that the Chinese government accepted its social legitimacy and ratified the treaty in the 1980s. In fact, China made a reservation upon signature and further confirmed upon ratification that "the Chinese government *does not recognize the competence of the Committee against Torture* as provided in the article 20 of the Convention" (UN 2013b; Italics mine).

When China ratified the CAT in 1987, it was still at an earlier stage of opening up to the outside world, and making reservations to exempt major treaty obligations made sense. However, as China gradually deepened its integration with the international human rights regime, if its leaders had fully internalized and accepted the normative legitimacy of the human rights norm, one would expect it to take on more boundary-trespassing obligations and make more binding legal commitments in international treaties. In fact, using the time period of China's signing and ratification of the CAT as a reference point, China has indeed made progress to reform its legal system, harmonize its domestic legislation with the CAT, and comply with the treaty at the procedural level by regularly submitting reports to the Committee on measures taken to implement the treaty.⁶⁹ However, this gradual and incremental progress has not yet accumulated to a "turning point" at which China could delegate substantive sovereign authority

or accept more intrusive monitoring roles for independent human rights bodies in international treaties.

China's aversion to hard law in the human rights issue area is also reflected in its rejection of the Optional Protocol of the CAT, adopted by the UN General Assembly on 18 December 2002. Unlike the soft law features of the CAT, the Protocol stipulates a mandatory inspection mechanism and greatly strengthens the enforceability of the regime. The Protocol establishes an independent Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (Subcommittee on Prevention) to *regularly visit* places where people are deprived of their liberty. Each State Party, upon ratification, accepts the *mandatory obligation* to allow the visits of the Subcommittee to its prisons and places of detention *without reservation*.

China had participated in negotiating and drafting the Optional Protocol from the very beginning. In line with its positions on the compulsory jurisdiction of the ICC, China had emphasized the principles of “non-intervention” and “state consent,” insisting on states’ right to reject a visit proposed by the Subcommittee (Kent 2007: 213). Moreover, China allied with the United States to support allowing reservations to the Protocol (Kent 2007: 214). However, China’s positions did not gain majority support and were not incorporated into the final version of the Optional Protocol, which was adopted by 104 votes in favor to 8 against, with 37 abstentions. China was once again among the small minority of states casting a negative vote for the Protocol.⁷⁰ Up to this point, there has been no sign that China will join the Optional Protocol in the foreseeable future.

1.2 China’s Policies on CTBT

⁶⁹ For detailed discussions on China’s compliance, see Kent 1999; 2007.

The CTBT is one of the most important arms control and disarmament treaties in the security issue area. Adopted by the UN General Assembly in 1996, it has not yet entered into force nearly two decades after it opened to signature. The CTBT bans all nuclear explosions in all environments and requires states to give up the sovereign authority to conduct nuclear tests. It establishes a verification regime to ensure that no nuclear explosion goes undetected. The regime consists of two important pillars: the International Monitoring System (IMS), which created facilities worldwide to monitor states for signs of nuclear explosions; and the on-site inspections, which can be dispatched to the area of a suspicious nuclear explosion if the data from the IMS indicate that a nuclear test has taken place (CTBTO Website). Although on-site inspections have certain boundary-trespassing and mandatory features, they cannot be triggered automatically, but must be requested and approved by *more than 3/5 member states once the CTBT has entered into force*. Therefore, no on-site inspection can be conducted before the treaty takes effect; even after its entry into force, the 3/5 majority approval is the prerequisite for such an inspection.

China had participated in the negotiations from the very beginning and signed the treaty in 1996. The material factor of China's increasing nuclear capacity and the ideational force of international social pressures both played important roles in its decision making. However, given China's weak socialization process and the CTBT's strong impacts on its sovereign authority in critical security areas, China insisted on the *supermajority* rather than simple majority criteria as the threshold to trigger an on-site inspection, as well as *all* critical states' ratification as the precondition for the treaty to enter into force. Since China's acceptance of the treaty's social legitimacy is highly contingent on other critical states' ratification, and some of those states such as the US, India, North Korea, and Iran have not committed to treaty obligations, China has not

⁷⁰ The other seven states are Cuba, Israel, Japan, Nigeria, Syria, the United States, and Viet Nam. Among those, Israel and the US joined China in voting against the Rome Statute of the ICC.

ratified the CTBT in the time since its signature.

In the early 1990s, China was not enthusiastic about negotiating the CTBT. Its nuclear technology and development lagged behind all the other nuclear powers, and banning the tests comprehensively at that time would have negatively affected its relative power (Johnston 2008).⁷¹ Nonetheless, participation in the negotiations had forced China to race against time, speeding up the process of modernizing its nuclear weapons before the international society adopted the CTBT. As Jeffrey Richelson (2006) concludes based on a series of declassified CIA documents on China's nuclear activities from 1990 to 1996, "The prospects of a Comprehensive Nuclear Test Ban Treaty (CTBT) in the early 1990's led China to accelerate its testing schedule." The success of a series of nuclear tests conducted during the negotiations, despite great international social pressures, is a major factor contributing to China's acceptance of the CTBT in 1996. For example, a declassified joint intelligence memorandum between the CIA and Defense Intelligence Agency on 30 September 1994 clearly states,

"China is expected to conduct at least six more underground nuclear test through 1996 in order to complete its nuclear weapon modernization program, [blank] China's modernization objectives include completing warhead development for ICBMs and SLBM systems and programs to enhance confidence in warheads that are planned for the enduring stockpile. If China is successful in completing its modernization program objectives on schedule, it probably will support a concluding a Comprehensive Nuclear Test Ban Treaty (CTBT) in 1996. However, a failure or delay of the remaining test could result in additional test, which could delay China's acceptance of a CTBT" (Central Intelligence Agency and Defense Intelligence Agency: 1994; italics original).

Just as this document predicted, China conducted exactly six nuclear tests afterwards—the last one on 29 July 1996, two months before China signed the CTBT. Although the exact

⁷¹ In order to demonstrate the socialization effect as the *sole* cause for China to sign the CTBT, Johnston in his book *Social State* argues that the treaty does not provide direct material incentives for China and may even have negative impacts on its relative power vis-à-vis the United States and other nuclear powers. However, these factors seem to be exaggerated, as Johnston does not consider the possibility that China shared common interests with other great powers to prevent other states from acquiring nuclear weapons, and that China could narrow the technological gap to a certain extent during the negotiation period. Moreover, given that Johnston's study mainly focuses on China's

purpose and results of those tests were unknown to the outside, it is very likely that they met China's expectations and achieved the intended goals. Moreover, it is also likely that China had already acquired or been close to mastering the technology of computer-simulated nuclear tests around 1996, as the rest of the nuclear powers did at that time. This technology allows states to continuously modernize its weapons and ensures the security of its nuclear arsenal without violating the CTBT, as the treaty bans only real nuclear explosions and not computer simulations. According to a 2001 *New York Times* article, when speaking with news reporters regarding the Bush Administration's statements that China might resume nuclear tests, a Chinese diplomat said, "China was a signer of the Comprehensive Nuclear Test-Ban Treaty and as such would stand by the intent of the treaty...China had some capacity to test the safety of those weapons by computer simulation" (Perlez 2001). Judging by this information, China should have acquired this technology no later than the mid or late 1990s, as its officials would not disclose the acquisition of such sensitive technology at the very beginning of its development.

Besides the increased nuclear capacity, international social pressures in the early and mid-1990s also played an indispensable role in socializing China and altering its positions on the CTBT. As Iain Johnston's book *Social States* (2008) shows, the micro-mechanism of social influence, such as shaming and blaming, had continuously forced China to modify its positions to meet the expectations of the international society and take more cooperative and supportive stances during the negotiations.

A retired senior UN official who was closely involved in the CTBT negotiation also confirmed these socialization effects. He stated that the international social pressures China faced came from both developed and developing countries. Unlike many other issues, on which

behavior of signing rather than ratifying the CTBT, he does not pay attention to the roles of the pre-existing sovereignty norm and the mechanism of weak socialization in *limiting* the degree of changes in China's policies.

China could usually gain the support of developing states, China's nuclear tests were strongly opposed by most non-nuclear developing countries—especially when France finished its last nuclear test in January 1996, as China became the only state that still scheduled tests in that year and thus was the focus of the entire international society. In fact, as he suggested, the anticipation that the treaty would soon be adopted, and their desire to participate as a founding member, was one important reason that Chinese leaders felt it imperative to upgrade China's nuclear weapons and accelerate the tests in the mid-1990s. If China could not grasp the brief window of opportunity to conduct more tests and improve its nuclear technology before 1996, further tests would become illegitimate and incur even much higher social pressures and costs once the treaty was passed (interview NY100326). Therefore the interactive effects of the rising social legitimacy of the non-proliferation norm as well as the increase in China's nuclear capacity on the eve of the adoption of the CTBT contributed to China's cooperation and acceptance of the treaty.

Yet, China's policies on the CTBT should be understood as a case of weak rather than strong socialization, because the mechanism for China to sign the treaty is "social influence" (Johnston 2008: 99-117) rather than "persuasion" and norm internalization, which are associated with more profound changes of interests and identities in the absence of material incentives (Johnston 2008: 155). The *limits* of the socialization effects in changing China's behaviors and lowering the normative premiums of ceding control rights over nuclear tests can be demonstrated in China's stances on the monitoring mechanism of on-site inspection as well as the entry-into-force clause. In order to minimize the boundary-trespassing effects and the sovereignty costs of the CTBT, China had insisted that only when more than two-thirds of the member states approved, and only after the treaty entered into force, could on-site inspections take place in a

sovereign state's territory. Such a position was in conflict with the US' proposal, which required only a simple majority (more than half the members' approval). The two sides eventually came to a compromise: the treaty stipulates that on-site inspection can be dispatched when more than 3/5 party states agree and only *after the treaty enters into force*.

In fact, China also had extensive input in designing the entry-into-force clause, which determines the social legitimacy and legal effects of the CTBT. Unlike other international treaties, whose entry into force requires only a *certain number* of states to ratify, the CTBT is the *only* international agreement that lists the names of 44 countries, including all nuclear states and states with nuclear capabilities in Annex II, and stipulates that the treaty can take legal effect only after the ratification of *all* 44 states. That means as long as *one* of those states refuses to sign and ratify the treaty, it cannot take legal effect. This clause fully reflects China's preferences: although it supported the treaty, given the potential impacts of the CTBT on its national security and relative power, China would make binding commitments and accept the treaty's social legitimacy *only* when all major nuclear states, especially the US and India, had also ratified it. According to an interview with a UN official in the Office of Disarmament, China insisted on listing the names of all nuclear powers and major states with nuclear capabilities in the Annex. This stance was supported by most states during the negotiations, because the purpose of the CTBT was to prohibit those particular states from nuclear tests; if any of those states refused to obey treaty obligations, the legitimacy and the effect of the treaty would be challenged. In fact, by listing the names of specific countries, the international society intended to pressure some major states with nuclear capabilities at that time—for example, India—to participate in the regime and give up their plans of acquiring nuclear weapons (Interview NY030510).

However, following India's nuclear tests in 1998 as well as North Korea's recent tests, the prospect of the entry into force of the CTBT has become very slim, as has the chance for China to ratify the treaty. According to the aforementioned retired UN official who participated in the negotiation of the CTBT, international arms control and disarmament negotiations have come to a low ebb as a result of these tests. Against this background, China has not yet expressed a clear intention to ratify the CTBT, because the United States has not done so yet. Even had the U.S. decided to ratify, China might have not followed suit, since other Annex II countries, such as India, Israel, North Korea, and Iran, were also unlikely to join the CTBT regime in the near future (Interview NY100326).

1.3 China's Policies on the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol

The United Nations Framework Convention on Climate Change (UNFCCC) was adopted in 1992 and entered into force in 1994. It sets up the general goal of stabilizing the emissions of greenhouse gases (GHG) at a level that would prevent dangerous human interference with the climate system. The treaty differentiates Annex I Parties of developed countries⁷² and non-Annex I Parties of developing countries, requiring industrialized countries to take the lead in modifying their behaviors leading to GHG emissions (UN 1992b). Nevertheless, since the UNFCCC is a framework convention and does not require states to take on binding legal obligations to meet specific abasement targets, it is a soft law in nature and imposes minimal sovereignty costs on states. In order to further implement the UNFCCC, the international society began to negotiate a more enforceable protocol in the subsequent years from 1995 to 1997. As a result, the Kyoto Protocol, adopted on 11 December 1997 and entering into force on 16 February

⁷² The Annex I of the UNFCC lists 24 developed countries, the European Economic Community (ECC), and 11 East European states in transition to a market economy.

2005, establishes legally binding emissions targets for Annex B *developed countries*⁷³—most of which are Annex I parties of the UNFCCC—and requires them to reduce at least 5 percent GHG emissions in total from 1990 levels in the first commitment period by 2008-2012. In addition, it sets up three market-based operating mechanisms for states to meet their targets: International Emissions Trading (IET), Clean Development Mechanism (CDM), and Joint Implementation (JI). These measures allow developed countries to buy emissions quotas from developing countries, trade quotas among themselves, and receive credits for financing emissions reductions in developing countries. In contrast, developing countries have no binding targets, although they are also required to make efforts to reduce GHG emissions (UN 1997b). In that sense, the Kyoto Protocol is a relatively high-cost treaty for industrialized states, but a low-cost soft law for developing countries. This differentiation between the two groups of states in both the UNFCCC and the Kyoto Protocol reflects the “common but differentiated responsibilities” principle governing the international atmospheric environmental issue area.

China is one of the most enthusiastic norm entrepreneurs of this principle in international environmental institutions. The norm not only allows the international society to achieve the common aim of environmental protection by mitigating the distributive effects among developing and developed countries, but also coincides with China’s material and sovereignty interests and enables China to participate in environmental cooperation without bearing high sovereignty costs. Unlike boundary-trespassing norms in other international legal regimes, the “common but differentiated responsibilities” principle usually does not impose binding obligations or high sovereignty costs on developing countries, as the essence of the principle is to require developed countries to bear greater responsibilities and provide necessary side

⁷³ Annex B of the Kyoto Protocol lists 25 developed countries and the European Economic Community as well as 13 Eastern European states in transition to a market economy.

payments—i.e., financial and technological assistance—to developing countries, allowing the two groups of states to cooperate for the common aim of environmental protection.

The *congruence* between this principle embedded in major environmental treaties and China's material and sovereignty interests is the primary reason for China to sign and ratify both the UNFCCC and the Kyoto Protocol. As Article 3 of the UNFCCC states, "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their *common but differentiated responsibilities and respective capabilities*. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof" (UN 1992b). Moreover, the treaty recognizes the concept of "per capita emissions" as the criterion to determine a country's emissions level and relevant responsibilities. For example, the treaty's preamble notes "that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that *per capita emissions in developing countries* are still relatively low and that the share of global emissions originating in developing countries *will grow to meet their social and development needs*" (UN 1992b).

According to former Chinese delegate Luo Jibin, who had participated many times in the negotiations of the UNFCCC, the incorporation of the above two passages in the treaty was a "hard-won" victory and had "significant meanings" for China, because it excluded China from the group that should take the lead to reduce emissions and provided enough time for China to adjust its energy structure without sacrificing economic development. As Luo discussed the origin of the "common but differentiated responsibilities" principle in an interview with the China Net:

As China's emission level was in the third or fourth place in the world at that time, some delegations intentionally or unintentionally required states that had the highest

emissions levels, including China, to reduce emission first. That means our energy usage and development would be restricted, and [such suggestions] were especially harmful for big developing countries, such as China, India and Brazil. *Adopting the concept of “per capita emission” excluded China and most developing countries [from that group] ...and provided us a relaxed environment for economic development.* The treaty text also says that the share of global emissions originating in developing countries would grow. That means that in a certain period, *developing countries does not need to restrict emission, but are allowed to increase emissions. This is fair and reasonable for both developed and developed countries.* Given that industrialized countries developed in early time and had already emitted for 200 years, yet our reform and opening had just started for a short period and most our electricity and heating relied on coals, which were high-waste and low-efficient, it would take a long time for us to change our energy structure, learn to use renewable and clean resources, and improve energy efficiency” (China Net 2010; italics mine).

The Kyoto Protocol further confirms the “common but differentiated responsibilities” principle by setting up binding obligations solely for industrialized countries. As the UN website of the Kyoto Protocol says, “Recognizing that developed countries are principally responsible for the current high levels of GHG emissions in the atmosphere as a result of more than 150 years of industrial activity, the Protocol places a heavier burden on developed nations under the principle of ‘common but differentiated responsibilities’” (UN 2013c). China signed the Kyoto Protocol in 1998 and ratified it in 2002—three years before the treaty entered into force. A necessary condition for China to actively participate in the UNFCCC regime and ratify the Kyoto Protocol even before several critical developed countries did so is that those treaties exempt China from binding and boundary-trespassing obligations, enabling it to *voluntarily* take on reasonable social responsibilities and participate in environmental cooperation without bearing high material and sovereignty costs.

Nevertheless, because the “common but differentiated responsibilities” principle generally coincides with China’s sovereignty belief and does not have significant boundary-trespassing effects on China, it cannot significantly lower the normative premiums for China to cede sovereign authority and make legally binding commitments in environmental issue areas. To a

certain extent, this principle can also shield China from international social pressures, allowing it to divert some of those pressures to developed countries. Although China has *voluntarily* committed to lower emissions to 40-50% below the 2005 level by 2020, it has still been unwilling to take on any binding treaty obligations that may impose higher sovereignty costs. For example, in recent renegotiations on the extension of the Kyoto Protocol in Doha in 2012, Chinese delegates reemphasized the “common but differentiated responsibilities” principle and further pushed developed countries to “take the lead” and “raise their emission reduction targets” in the following years (Takungpao 2012). Moreover, the Deputy Director of the Reform and Development Commission, Xie Zhenhua, indicated in a 2012 press conference that China would not consider taking on any binding obligations until 2020. As Xie said, although China would take an open attitude towards negotiating a new binding legal agreement that applies to all countries after 2020, such negotiations had conditions, and “must be based on the principles of equity and common but differentiated responsibilities and respective capabilities” (Xinhua Net 2012).

As the three cases in this section show, China’s policies on soft laws, such as the CAT, the CTBT, and the Kyoto Protocol, exhibit the same behavioral pattern as its approach to hard laws. Because China has internalized and accepted the normative legitimacy of the Westphalian sovereignty since the early period of the PRC, it often plays the role of sovereignty norm entrepreneur in the international society. Although alternative boundary-trespassing ideas and practices have played an indispensable role in softening China’s sovereignty belief and lowered the normative premiums of ceding control rights, they cannot replace the sovereignty norm and play a dominant role in shaping China’s interests and identities. Given that China is still at a weak socialization stage, it is unlikely to take the lead in promoting binding boundary-

trespassing changes or fully accept legalized treaty provisions without substantive reservations.

2. China's Changes and Continuities in the Last Decade

Since the empirical studies of this research mainly focus on China's decision making in the late 1990s, it is important to test the generalizability of the arguments and examine whether the logic of changes and continuities in China's approaches to sovereignty and legalization applies in other time periods, especially in the most recent decade and in the future. Although China's relative power has increased significantly, its integration with the world has further deepened, and its society has become more pluralized in recent years, several important arguments developed in this dissertation still hold and can also help us to make *falsifiable* predictions about China's policies on legalization in the near future.

First, given that the sovereignty norm still plays an important role in determining China's national interests—and that the civil society, still weak vis-à-vis the state, cannot effectively organize to have significant impacts on China's foreign policymaking, especially regarding international treaties with hard law features—boundary-trespassing changes *at the state level* are usually caused by material factors and weak socialization effects, not by Chinese leaders' internalization or acceptance of the normative legitimacy of alternative norms. Therefore, *it is impossible for China to formally delegate territorial disputes in international agreements, ratify treaties that may have negative impacts on its core sovereignty, or accept binding legal obligations in hard law without making reservations to lower sovereignty costs*. Second, when negotiating an international treaty, China tends to promote flexible treaty arrangements, such as opt-in mechanisms and exclusion and reservation clauses, to soften treaty obligations and minimize sovereignty costs. If a treaty is soft law in nature, China usually will not reject it; otherwise, *the precondition for China to sign and ratify a hard law with mandatory DSM and*

binding obligations is that the treaty concerns solely non-core sovereignty issues or incorporates exclusion and reservation clauses for China to exempt its core sovereignty.

To say that the arguments of this dissertation apply to the most recent period and the future is not to deny the many important changes China has experienced in the past decade; but boundary-trespassing changes at the state level are unlikely to be caused by strong socialization effects—i.e., Chinese decision makers fully internalizing and accepting the normative legitimacy of alternative norms, so that the normative premiums for China to cede control rights can be reduced dramatically and China can sign and ratify any type of hard law without substantive reservations.

2.1 New Developments of China's BITs

The most notable development regarding China's BITs has taken place in China's academic community. Although China signed its first legalized BIT in 1998 and has enacted the new BIT practices more systematically since 2000, China's BIT scholars did not seem to capture the new trend until the mid-2000s. In their discussions of China's new BITs, these academics generally express more conservative sovereignty views than the government does. They tend to believe that the government should be more cautious about signing legalized BITs, especially with developed countries.

China's leading research team on BITs is headed by Professor Chen An in the Law School at Xiamen University. One of China's most well-known BIT experts, Chen was previously appointed by the Chinese government as an arbitrator to the ICSID. According to a brief online introduction to Chen's research, the most renowned feature of Chen's work is "taking the common stances of developing countries and small and weak states in the world, grasping the essence of the North-South conflicts, and committed to the goal of establishing the new

international economic order” (Xiamen University’s website 2013). Given Chen’s clear-cut political views, he and his colleagues tend to perceive China’s interests as aligning more with developing than developed countries; as legalized BITs and the trend of liberalization of FDI represent mainly the interests of developed countries, the costs for developing countries and China to sign legalized BITs may override the potential benefits (Chen A. and Cai, C. 2007; Chen A. 2007; Chen, H. 2007; Zeng, H. 2007; Xu, C. 2007).

For example, Chen An argues that legalized BITs China signed in recent decade have removed most “safety valves”—i.e. eligible reservations—granted by the ICSID Convention (Washington Convention) and may have negative impacts on China’s economic sovereignty. Although the new BITs may help China to protect its own overseas investment, China’s total capital outflow was only 4.87% of its capital inflow from foreign countries in 2006; in that sense, the ratio of benefits and costs for China to sign legalized BITs is nearly 5:95, and the chances that the Chinese government will be sued by foreign investors will increase significantly (Chen, A. 2007: 373). Chen even suggested that “it is not too late to lock the stable door after the horse has bolted” [*wang yang bu lao, wei shi wei wan*]. That means that China should, from now on, differentiate two types of states. It should sign liberal and legalized BITs with developing states, which are more likely to be the hosts of China’s overseas investment; and it should stop signing such treaties with developed countries, which have a large amount of investment in China (Chen A. 2007: 359-394).

Moreover, Chen and his colleagues believe that although legalized BIT reflects a broader trend of economic globalization and liberalization, developing countries follow the trends and sign more liberal BITs partly because industrialized countries use a strategy of “divide and govern”—signing BITs with individual states that need FDI the most and then pressuring the rest

of the third world to follow suit—and partly because those developing countries blindly accept neoliberal economic ideas that benefit developed more than developing countries (Chen, A. and Cai, C. 2007: 5; Chen H. 2007: 15-19). Therefore, they believe that China should negotiate and sign BITs in accordance with its own national interests, rather than uncritically following the globalization trend. According to Zeng Huaqun, a famous investment law professor at Xiamen University, the essence of the conflicts between the pro-sovereignty “Calvo Doctrine” and the pro-investment “Hull Rule” is “a fight between national sovereignty”: developing countries try to defend and maintain national economic sovereignty, while developed countries intend to weaken and deny that sovereignty. Yet, because of the trend of economic globalization, especially the extension of the WTO rules into investment issue areas, the new developments of the BITs seem to favor developed countries (Zeng, H. 2007: 72). However, other developing countries’ acceptance of the Hull Rule should not be the reason for China to give up the Calvo Doctrine. As only a few big developing countries have the capability to counterbalance developed countries in today’s international society, “China, as a major developing state, should take the unavoidable historical and international responsibilities to defend the common interests of developing countries and to establish the NIEO. If China follows the ‘precedents’ of other developing countries to accept the Hull Rule, and even views the Hull Rule as a ‘trend of the times’ and drift along with it, [such thoughts and behaviors] are not in accordance with our role of a ‘responsible great power’” (Zeng, H. 2007: 95-96).

Although not all Chinese BIT scholars hold the same strong “North-South” perceptions as Chen and his colleagues do—some even recognize that “the liberalization of FDI is an inherent demands of a market economy, and reflect the common economic interests of both developing and developed countries” (Lu, J. and Feng, Y. 2007: 7)—they generally believe that legalized

BITs encroach more on China's economic sovereignty and that the government should be more cautious about signing such treaties. For example, Yu Jinsong, a famous investment law professor at Renmin University, maintains that international arbitration is not necessarily superior to domestic mechanisms of dispute resolution, and that China should try to solve disputes with foreign investors locally. Yu suggests that China "walk with two legs": on the one hand pushing the reform and improvement of international DSMs, and on the other hand strengthening domestic DSMs that can be trustful to foreign investors. "In the long run, improving domestic DSMs and trying best to solve investment disputes locally, avoid international arbitration, and lower the costs of litigation are the best and fundamental solutions for developing host states" (the Website of the 22nd Congress on the Law of the World).⁷⁴ Moreover, a BIT specialist at Renmin University confirmed in an interview that China's BIT scholars in general felt that the government had taken a very bold step, "being too open" (fang de tai kai) in signing new BITs, especially with developed countries. Some scholars had already conveyed their concerns to MOFCOM officials and suggested that the government be more cautious in future BIT practices (interview BJ080425).

However, judging by the BITs China has signed in the last five years, the government does not seem to have reversed from the previous liberalization trend, nor does it selectively sign legalized BITs with developing countries, but soft treaties with developed countries—as suggested by Professor Chen An. On the other hand, China also has not softened its reservations to the BITs in recent practices. As a MOFCOM official said in an interview, China's new BITs had followed the relatively conservative practices of the world and had already taken precautionary measures, such as the "stand still" clause and the exhaustion of domestic administrative reviews requirement, to safeguard its economic sovereignty. For example, the

⁷⁴ <http://www.chinacourt.org/zhuanti1/22clw/detail.php?id=177220>. Accessed: 05/31/2013.

major contents of the most recent BIT China signed with Canada in September 2012 are consistent with the new BITs signed with other developed countries in the early and mid-2000s. In fact, Canada seemed to make a big concession to accept China's reservations in the treaty Protocol, given that most previous treaties Canada had signed resembled the most liberal American-type BITs.⁷⁵ Therefore, if Chinese scholars' opinions do have impacts on China's BIT policies, they can only make the government more alert to its economic sovereignty and prevent China from further liberalizing and loosening its reservations to the BITs in the future.

2.2 New Developments Regarding the Rome Statute and the ICC

Similarly to the BITs, the most obvious changes regarding the Rome Statute emerge in Chinese academic circles. Although Chinese scholars' discussions of the ICC negotiations were dormant and sporadic before 1998, the adoption of the Statute at the Rome Conference has aroused the awareness and enthusiasm of Chinese academic elites, especially in the legal community. There have been burgeoning academic conferences and research on the Statute and the ICC in China since the entry into force of the Rome Statute in 2002. Most studies on the ICC are descriptive and for introductory purposes; yet even from their descriptive analyses, one can infer that Scholars' opinions on the Statute are more diverse and liberal than the official stance. Most Chinese researchers recognize the significance of the establishment of the ICC, viewing the Rome Statute as a "historical breakthrough" and a "milestone" in the development of international humanitarian and criminal law (Zeng, L. 1999: 141; Huang, F. 2000: 43; Li, X. 2002: 51; Xu, C. 2004: 29; Zhang, S. 2006:20). They believe that the treaty will have significant impacts on international relations and on international law (Liao, M. 2003: 193; Zhu, W. 2003:

⁷⁵ According to an interview with a MOFCOM official, although the BIT negotiations between China and the United States have taken several rounds, one important reason that China has not yet signed a BIT with the US is that the US has insisted on the most liberal BITs and been unwilling to accept China's reservations. China has been unable to sign the American-type BIT without any reservations.

149; Zhao, B., Wang, X., and Huang, F. 2003: 473; Zhang, L. 2009: 350-351).

Some researchers have more positive views on the Rome Statute than the Chinese government does, believing that China will sign the treaty when the time is ripe. For example, a group of scholars at Beijing Normal University has taken the lead in research on the ICC. Zhang Shengjun, a professor at the School of International Relations, published an article on the ICC in *World Economics and Politics*—one of China’s first tier international relations journals. According to Zhang, the inherent and compulsory jurisdiction of the ICC reflects “the basic values of the liberal international order and is an important landmark representing the transformation of the rule of the law of the international society from a Westphalia Model to a liberal model” (Zhang, S. 2006: 20). Similarly, Gao Mingxuan and Wang Xiumei, two well-known criminal law professors, point out in a coauthored article that the Rome Statute reflects “the spirits of justice and peace” and “the common interests of the human being”; the Court is the best legal instrument for the international society to punish and deter serious international crimes (Gao, M. and Wang, X. 2004: 17, 19). Wang also suggests that even if China is not a party to the Rome Statute, as a member of the international society it should incorporate the core crimes defined in the Statute into domestic criminal law and make such law in accordance with the Statute’s major provisions, giving domestic courts prioritized jurisdiction over crimes and making the ICC complementary (Wang, X. 2005: 185).

Moreover, Zhang Lei, another ICC expert at Beijing Normal University, even questions some of the Chinese government’s positions in a recently published book, *China and the International Criminal Court*. He argues that not all of the Chinese government’s arguments against the Rome Statute are tenable from a rigorous legal perspective. For example, the ICC’s jurisdiction does not deny the jurisdiction of a state’s national courts: as long as a national court

takes the necessary actions in accordance with domestic criminal and international law, it can exclude the jurisdiction of the ICC. This actually prioritizes state sovereignty and reflects the principle of complementarity (Zhang, L. 2009: 252). Zhang also lists a series of costs to China's objection to the Statute: failing to sign the treaty will hurt China's international image and social status, weaken its influence on the development of international criminal law, marginalize its role in international legal and political affairs, slow down the process of internationalizing the domestic legal system, miss the opportunity to integrate with international legal institutions, and hinder the domestic legal research and training of legal experts on international criminal law (Zhang, L. 2009: 263-265). Although Zhang recognizes that the Rome Statute reflects mainly Western values and may have negative impacts on the Taiwan and Tibet issues, he implies that the human rights norm embedded in the Statute is also universal, as the Western and Chinese cultures will eventually integrate with each other; the costs of staying outside the regime may be even higher for China than the costs of participation. Therefore, he suggests that China should eventually sign the Rome Statute, rather than staying outside the mainstream of the international society (Zhang 2009).

Although positive views on the ICC and the support for China's acceptance of the Rome Statute have gradually risen within China's academic community, there has been no clear evidence that those scholars' opinions have had significant impacts on the government's decision making or been echoed at the broader society level. Unlike in many other countries, China has not yet formed any NGOs to promote China's participation in the Rome Statute, and scholars are unlikely to organize to exert pressure on the government. In fact, one major challenge for those scholars who support the Rome Statute is to persuade Chinese leaders and government officials that the negative impacts of the treaty on China's unification and regime security are minimal.

However, few scholars have proposed feasible solutions for the potential conflicts between the ICC's mandatory jurisdiction and China's core sovereignty interests, and thus cannot dismiss the government's concern about the high sovereignty costs imposed by the Rome Statute. Therefore, China is unlikely to sign and ratify the Rome Statute in the near future.

2.3 The UNCLOS and Its Implications on Territorial Disputes in East and South China Seas

The theoretical and empirical work of this dissertation can shed particular light on the recent tensions between China and its neighboring countries regarding sovereign control rights over the maritime territories in the East and South China Seas. Although most China experts believe the Taiwan issue is the most likely hot spot to trigger China's revisionist policies and disrupt the international order in Asia, they usually do not see border and maritime territorial disputes as being as explosive as issues regarding homeland territories (for example Johnston 2003; Carlson 2005; Fravel 2008). Nevertheless, the empirical findings of this dissertation show that Chinese policymakers' sovereignty beliefs are weakened only in non-core issue areas: their stances towards the core sovereignty of jurisdictional and territorial control rights have rarely softened.

In fact, signing and ratifying the UNCLOS will not have constraining effects on China's behaviors regarding those disputed offshore islands, because China has made a clear declaration that it excludes all types of disputes allowed by Article 298—the exclusion clause—from the mandatory DSMs of the UNCLOS. Chapter 2 shows that the Westphalian norm regarding control rights over maritime territories has even been strengthened by the UNCLOS in the international society, because the treaty provisions of territorial seas, contiguous zones, EEZs and the continental shelf are boundary-reinforcing, rather than -trespassing. The negotiation and entry into force of the treaty have aroused states' consciousness of the seas and triggered the new “enclosure movement” in the oceans in the past decades.

As China's material power rapidly increases, China has become more assertive in claiming its sovereignty over disputed offshore islands in Asia. Moreover, this assertiveness is paradoxically driven by the increasing legitimacy of the UNCLOS and the *uti possidetis ita possideatis* (as you possess, so you may possess) principle around the world. China attaches high value to territorial control rights, yet most disputed islands are under other countries' control; therefore, if China does not take some action to strengthen its sovereignty claims, the status quo will gain increasing legitimacy—making it even costlier for China to challenge the control rights of other Asian states in the future.

However, contrary to China's expectations, although China has applied the exclusion clause and refused to accept any mandatory DSMs regarding maritime territorial disputes, this unilateral declaration cannot prevent other countries from resorting to the ITLOS or arbitrations to exert pressure on China. Against the background of increasing tensions with China, the Philippines for the first time chose to use one of the mandatory DSMs of the UNCLOS, submitting the dispute to the ITLOS and requiring it to form an arbitral tribunal in January 2013. According to Annex VII of the UNCLOS, if both sides of a dispute agree to use the arbitration procedure, each side can appoint one arbitrator and both sides should consult with each other to choose another three arbitrators to form a five-member tribunal. Not surprisingly, China formally rejected the Philippines' request for arbitration, claiming that its action had no legal basis. Despite China's opposition, the President of ITLOS, Japan's Shunji Yanai, began appointing arbitrators in March. The tribunal was fully constituted on April 24, with a Sri Lankan judge appointed president of the arbitration panel, which included French, German, Dutch, and Polish judges (*South China Morning Post* 2013). The tribunal's first task is to decide whether it has jurisdiction over the dispute submitted by the Philippines. In fact, whether the tribunal eventually decides to have

jurisdiction over the case or rejects it in accordance with the exclusion clause and China's reservation, the Philippines' action has already exerted great pressure on China and placed it in a passive position. Since China refused to resort to mandatory DSMs for territorial disputes, it is unlikely to participate in the arbitration; its absence may result in a decision that is unfavorable to its claims. As Xing Guangmei, a legal scholar of the Chinese Navy, said in an interview with the official newspaper *Global Time*, "Philippines' legal action shows its capability of making use of the international 'rules of the games', and how to deal with (the challenge) next is not an easy task for China" (*Global Times* 2013).

The most recent tensions between China and its neighbors, such as Japan and the Philippines, over disputed islands in East and South China Seas further demonstrates that China attaches high value to territorial control rights and that the normative premiums for ceding core sovereignty are extremely high. The Philippines' action and the arbitration tribunal's active response to its request can only strengthen China's aversion to mandatory dispute resolution over core sovereignty. Therefore, China cannot possibly withdraw its reservations to the UNCLOS for a long time. Moreover, this incident may teach China to be more alert to legalized dispute resolution concerning core sovereignty in future international negotiations, and even delay its acceptance of other hard laws that may have negative impacts on its jurisdictional and territorial control rights, such as the Rome Statute of the ICC and the Optional Protocol of the CAT.

The pattern of China's changes and continuities in the three types of hard laws also have important implications for its approach to international norms and its integration with the international society in general. The softening of China's sovereignty stances in non-core issue areas and its acceptance of most legalized treaties confirm an important finding of prior literature: China generally follows major international trends and moves along in the same

direction as international norms evolve. Nevertheless, the primary mechanism of material incentives in driving China's changes in hard laws, its unyielding stance on core sovereignty, and its persistent reservations to high-cost binding treaty obligations demonstrate that it is still in a weak socialization process. One important factor in China's ability to move from weak to strong socialization is the relative power of domestic and transnational civil societies vis-à-vis the party state. Without a strong and independent civil society and robust transnational social networks, China is unlikely to enter into a strong socialization stage or accept the most boundary-trespassing normative standards advocated by those "normative powers" of European countries.

Moreover, China's integration with the international society may not follow a linear progressive path as predicted by the three-stage norm diffusion (Finnemore and Sikkink 1998) or five-stage spiral models (Risse and Sikkink 1999). Its rising material and military power may increase the uncertainties of China's approaches to international law and order. On the one hand, China's rise may allow its leaders to discover new material and strategic interests that can be better realized by following established international rules and norms, thus deepening its integration with the international society, as the BITs and UNCLOS cases show. On the other hand, increasing material power may weaken China's law-abiding tendency and encourage Chinese leaders to take more assertive action to pursue its interests—especially regarding its core sovereign control rights, as the recent tensions with its neighbors in the East and South China Seas demonstrate. In that sense, China's integration may experience setbacks, and China's rise may increase its revisionist tendency in its approaches to international law and order.

3. The Generalizability of the Theoretical Framework in Cross-Country Analysis

The theory chapter of this dissertation proposes three different mechanisms that lead to boundary-trespassing behaviors of states over time. The increased material benefits of

participating in an institution or legal regime due to changes in a states' material interests and relative power can partially offset the sovereignty costs of ceding control rights, but do not change the strength of states' sovereignty beliefs and the normative premiums of deviating from the Westphalian norm. In contrast, accepting the legitimacy of a boundary-trespassing norm or trend can gradually weaken states' sovereignty belief and reduce the normative premiums of sovereignty costs. The legitimacy mechanism can be further differentiated into two types based on the degree to which a state is socialized by a boundary-trespassing norm. In a weak socialization process, states may have only a shallow understanding of the normative meanings of a social trend, but nonetheless tend to believe that an institution or norm with widespread support at the systemic level can have transformative impacts on the international order or represent an inevitable trend of history. Accepting the social legitimacy of a treaty or a boundary-trespassing norm can weaken the state's sovereignty belief to limited extent and incrementally lower the normative premiums for states to deviate from the Westphalian norm. Yet in a strong socialization process, states truly internalize and believe in the inherent values of a new norm. As a "principled belief" not only regulates and constrains states' behaviors and choices but also reshapes their identities and interests, accepting the normative legitimacy of a boundary-trespassing norm can further weaken the Westphalian beliefs and significantly lower the normative premiums of sovereignty costs.

Among individual states, the relative weights of material and normative forces in driving boundary-trespassing changes may differ, along with the degree to which the normative premiums of sovereignty costs can be weakened by alternative norms. Therefore, a detailed unit-level analysis, as in this dissertation project, is especially important to identify which mechanisms play more important roles in driving change in an individual state and in evaluating

how deeply a state is socialized with the international community.

If we arrange individual states across a continuum according to the strength of their sovereignty beliefs, China is close to one end of the continuum, where states internalize the Westphalian sovereignty more than other alternative ideas and their boundary trespassing changes are mainly caused by the evolution of material interests and weak socialization effects. In contrast, EU states in general are prototype states at the other end of the continuum, because their sovereignty beliefs have been greatly weakened and the normative premiums of ceding control rights are significantly reduced through a strong socialization process.

Three important factors may explain why Western Europe, as the origin of the Westphalian norm, can become a “normative power,” taking the lead in facilitating new boundary-trespassing changes in today’s world. First, the political shocks of the two large-scale world wars have greatly shaken the institutional and social foundations of the sovereignty norm and weakened it as a prior collective belief in determining foreign policies in the post-war Europe. As posited by Legro (2005: 9), “experienced consequences of critical events,” such as wars, revolutions, and economic crises, can often drive the collapse of an extant orthodoxy. Second, European countries’ practices of regional integration in economics, politics, human rights, and security areas for more than half a century help them to transcend sovereignty-centered politics, internalize alternative boundary-trespassing norms, and become entrepreneurs of new ideas in the international society. Moreover, the robust democratic institutions in Western Europe encourage the expression of pluralized interests and preferences from individuals and the society, allowing domestic and transnational social forces to exert meaningful influences on national and supranational decision-making.

However, to say that European countries are “normative powers” does not mean that

material factors do not play an important role in shaping their foreign policies, or that normative legitimacy is always the dominant mechanism for driving boundary-trespassing changes. In fact, in the cases of BITs and UNCLOS, material benefits are the key factors that lead European countries to promote legalized BITs and participate in the UNCLOS. Because the sovereignty costs of hard BITs are mainly borne by capital-importing developing countries, while capital-exporting developed countries mainly enjoy the benefits, promoting legalized BITs around the world is a low-cost activity and also in accordance with the material interests of Western European states. As for the UNCLOS case, when developed countries were not satisfied with the deep-seabed mining regime in the 1982 UNCLOS, which restrained their activities of exploiting seabed resources, they refused to sign the treaty in the 1980s.⁷⁶ Only when a renegotiated agreement adopted a market-based approach and better accommodated the interests of developed countries did Western European states start to accede in the 1990s.

Nevertheless, in comparison with other great powers such as the United States, China, Russia, and India, European states have entered into a relatively strong stage of socialization and accepted the normative legitimacy of many boundary-trespassing ideas, significantly reducing the normative premiums for ceding control rights to international legal authorities. Besides regional integration in various issue areas, European countries' internalization of new norms can be seen in two important examples: their active roles in promoting the legalized Rome Statute, and their endorsement of the "common but differentiated responsibilities" principle in the Kyoto Protocol. As Chapter 3 on the ICC shows, motivated by a strong normative belief in protecting individual human rights, the LM group, consisting of small and middle states including most

⁷⁶ The only exception at that time was Iceland, which ratified the UNCLOS in 1985. Iceland was one of the most enthusiastic advocates of the enlarged maritime rights of coastal states and could benefit greatly from the treaty.

European countries,⁷⁷ worked closely with an international NGO coalition—the Coalition for the ICC (CICC)—to advocate a strong, independent court. They believed that only a strong court with an independent prosecutor and automatic jurisdiction over all the core crimes could effectively deter and punish the most serious crimes in the international society. Because of their collective efforts throughout the negotiations, a more conservative pro-sovereignty draft supported by the great powers, including China, failed to gain majority support at the Rome Conference. The final version of the Rome Statute largely reflects the more liberal human rights view held by the European states and the NGO coalition.

In addition to the international human rights norm, European states also internalize the environmentalist idea more than the other great powers do. In order to achieve the common aim of environmental protection, developed European countries are willing to support the operational principle of “common but differentiated responsibilities” and bear more material and sovereignty costs than developing countries in major environmental treaties. As the previous section on the UNFCCC and the Kyoto Protocol show, both treaties list the names of all developed countries in their Annexes, requiring those states to take the lead and share more responsibility to reduce GSG emissions. The Kyoto Protocol especially set up a binding emissions target for developed countries. EU states were among the earliest developed countries to sign and ratify the treaty, and all of them had achieved the first-stage emissions targets by 2012. In contrast, some other industrialized counties are less likely to accept the “common but differentiated responsibilities” principle. For example, the US Senate passed the Byrd-Hagel Resolution even before the Kyoto Protocol was adopted, disapproving of any international agreement that *did not require developing countries to make emissions reductions* and would seriously harm the economy of the

⁷⁷ Although France and the UK were members of the P5 group and supported a weak court with limited jurisdiction, both countries shifted their positions to align with other EU countries after the changes of government in 1997.

United States (Byrd-Hagel Resolution 1997).⁷⁸ Moreover, even before the 2012 Doha conference, which agreed to extend the Kyoto Protocol to 2020 to accommodate the second-phase emissions target, the US, Canada, Japan, and Russia had announced that they would not participate in a second commitment period. In fact, without the EU countries' endorsement of the second-stage binding emissions targets, the Kyoto Protocol would have fallen apart and the "common but differentiated responsible" principle would have lost legitimacy among industrialized countries.

Although cross-country analysis is beyond the scope of this research project, the theory of sovereignty costs developed in this dissertation provides an overarching theoretical framework for unit-level analysis of individual states' policies and behaviors, as well as comparative studies of different countries' approaches to sovereignty and legalization. One possible direction to broaden the scope of this thesis in future research is to undertake a detailed comparison between China and one or two major EU states to see the similarities and differences between their negotiation positions and policies on several international treaties. Because China represents the states holding strong sovereignty beliefs and the EU countries are norm entrepreneurs of alternative boundary-trespassing ideas, a comparison of the two types of states will not only help us understand how and why individual states differ in terms of degree of socialization, but also provide insights on how international institutional and normative equilibria are achieved through the interaction of different states holding different normative values.

4. Conclusion

China's approach to sovereignty and legalization shows that in a weak socialization process, both material incentives and international social legitimacy are *effective* mechanisms for China to keep up with ongoing international institutional and normative developments and to deepen its

⁷⁸ <http://www.nationalcenter.org/KyotoSenate.html>.

integration with the world. Although the sovereignty norm still plays an important role in shaping China's interests and China has not been able to fully internalize alternative boundary-trespassing norms, it nonetheless values its membership and social image in the international community and is willing to follow the mainstream, moving along with major international social trends in most issue areas.

In fact, a robust and legitimate international order should be able to provide material benefits for a rising power and accommodate its strategic interests to a certain extent. If an international order can only benefit established great powers and denies the legitimate demands of a rising power, such an order is exclusive and unstable in nature and may easily turn a rising power into a revisionist state. In contrast, both the BITs and the UNCLOS cases indicate that when China's relative power increases, it sees more congruence between its strategic interests and the established international order and is more willing to participate in international institutions with binding obligations and high sovereignty costs. That means that the current international order can well accommodate the interests of a rising power, making China more likely to recognize its legitimacy and become a status quo state as its power increases.

Nevertheless, China's conservative stance on *core sovereignty* when signing international treaties also reveals some revisionist elements in China's foreign policy. Unlike previous studies which tend to attribute China's revisionism to its inherent *realpolitik* strategic culture (Johnston 1996; 2008) or to its rationalist and pragmatist approach to international norms (Kent 2008), this study views the strong sovereignty belief regarding jurisdictional and territorial control rights as the potential source of China's revisionism. As China's relative power increases, its positions on disputes over offshore islands and homeland territories may become more unyielding, as the most recent tensions between China and its Asian neighbors over maritime disputes suggest.

Moreover, since China is still in a weak socialization process and the normative premiums for China to cede sovereign control rights cannot be reduced significantly by alternative boundary-trespassing norms, China is unlikely to take on binding international obligations and accept hard laws without making substantive reservations to exempt its core sovereignty and lower sovereignty costs. Although China has experienced changes at both the state and society levels on a daily basis and has continuously deepened its integration with the international society, those changes have not accumulated to a tipping point so that Chinese decision makers will accept the normative legitimacy of boundary-trespassing ideas and enter a strong socialization process. In order for strong socialization to happen, China's domestic civil society and transnational social network must be strong and robust enough to exert effective influence on foreign policymaking and have the access to translate pluralist social preferences into national preferences. Otherwise, China's socialization process will continue to show strong statist features, and the logic and behavioral patterns of its approaches to sovereignty and legalization will fundamentally remain the same.

References

- Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. 2000. "The Concept of Legalization." *International Organization* 54 (3): pp. 401-419.
- Abbott, Kenneth W., and Duncan Snidal. 2000. "Hard and Soft Law in International Governance." *International Organization* 54 (3): pp. 421-456.
- Acharya, Amitav. 2004. "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism." *International Organization* 58 (2): pp. 239-275.
- Adler, E. 1992. "The Emergence of Cooperation: National Epistemic Communities and the International Evolution of the Idea of Nuclear Arms Control", *International Organization*, vol. 46, no. 1, pp. 101-145.
- Allee, Todd and Clint Peinhardt. 2011. "Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment". *International Organization* 65 (3): 401-432.
- _____. 2012. "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions". *International Studies Quarterly* 54 (1): 1-2.
- Annan, Kofi. 2001. Nobel Lecture. Nobel Prize Website:
http://www.nobelprize.org/nobel_prizes/peace/laureates/2001/annan-lecture.html#.
Accessed: 04/05/2013.
- Biersteker, Thomas J., and Cynthia Weber. 1996. *State Sovereignty as Social Construct*. Cambridge: Cambridge University Press.
- Buchanan, Allen, and Robert O. Keohane. 2008. "The Legitimacy of Global Governance Institutions." In Rüdiger Wolfrum and Volker Röben eds. 2008. *Legitimacy in international law*. New York: Springer.
- Bull, Hedley. 1977. *The Anarchical Society: A Study of Order in World Politics*. 1st ed. New York: Columbia University Press.
- Burke-White, William W. 2008. "The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System". *Asian Journal of WTO and International Health Law and Policy* 3 (1): 199-234.
- Büthe, Tim and Helen V. Milner. 2009. "Bilateral Investment Treaties and Foreign Direct Invest: A Political Analysis". In Karl P. Sauvant and Lisa E. Sachs eds. 2009. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford: Oxford University Press: 171-224.

- Buzan, Buzan. 1974. *Seabed Politics*. New York: Praeger Publishers.
- Byrd-Hagel Resolution 1997. Available: <http://www.nationalcenter.org/KyotoSenate.html>. Accessed. 07/24/2013.
- Cai, Congyan. 2007. “Duiwai touzi baohu yu zhongguo de shuangbian touzi tiaoyue shijian” [Protection of Foreign Investment and the Practices of China’s Bilateral Investment Treaties]. In An Chen and Congyan Cai eds. 2007. *Guoji touzifa de xinfazhan yu zhongguo shaungbian touzi tiaoyue de xinshijian* [The New Development of International Investment Law and the New Practices of China’s Bilateral Investment Treaties]. Shanghai: Fudan University Press: 427-454.
- Carlson, Allen. 2004. “Helping to Keep the Peace (Albeit Reluctantly): China’s Recent Stance on Sovereignty and Multilateral Intervention.” *Pacific Affairs* 77 (1): pp. 9-27.
- _____. 2005. *Unifying China, Integrating with the World: Securing Chinese Sovereignty in the Reform Era*. Stanford, California: Stanford University Press.
- Central Intelligence Agency and Defense Intelligence Agency. 1994. Chinese Nuclear Testing: Racing Against a Comprehensive Test Ban. Available: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB200/>. Accessed; 07/24/2013.
- Chayes, Abram, and Antonia Handler Chayes. 1995. *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge, Mass.: Harvard University Press.
- Chen, An 2007. “Qufen lianglei guojia, shixing chabie huhui: Zhongwai shuangban touzi xieding zhong de sida “anquanfa” buyi maoran quanmian chaichu” [Differentiating Two Types of Countries, Using Different Strategies: the Four Safe Valves of China’s Bilateral Investment Treaties should not be Completely Discarded]. In In An Chen and Congyan Cai eds. 2007. *Guoji touzifa de xinfazhan yu zhongguo shaungbian touzi tiaoyue de xinshijian* [The New Development of International Investment Law and the New Practices of China’s Bilateral Investment Treaties]. Shanghai: Fudan University Press: 359-394.
- Chen, An and Congyan Cai eds. 2007. *Guoji touzifa de xinfazhan yu zhongguo shaungbian touzi tiaoyue de xinshijian* [The New Development of International Investment Law and the New Practices of China’s Bilateral Investment Treaties]. Shanghai: Fudan University Press.
- Chen, Bingxin. 1991. “Woguo haiyang kaifa de xianzhuang ji qianjing” [The Current Situation and Prospect of Our Oceanic Development], *Zhongguo jingmao daokan* [China Economic and Trade Herald], no. 6, pp. 11-12.
- _____. 1992. “Yingjie haiyang shiji de daolai” [Welcoming the Century of the Seas], *Liaowang* [Outlook], no. 27, pp. 40-41.
- Chen, Jinya, and Shiyan Zeng. 1987. “Lu guoji touzi zhongcai yu ‘Huashengduo gongyue’ de guanxi” [On the Relationship between International Investment Arbitration and the

- Washington Convention]. *Guoji shangwu yanjiu* [International Business Research] 3: 22-27.
- Chen, Liuning. 2005. "Kunrao zhongguo de nanhai zhengduan" [The Disturbing Disputes in the South China Sea], *Guangjiaojing* [Wide Angle], no. 396, pp. 94-97.
- Chen, Zhenguo. 1985, "Lun linghai de wuhai tongguo quan" [On the Rights of Innocent Passage in the Territorial Sea], *Zhengzhi yu falv* [Political Science and Law], no. 1, pp. 31-34.
- Chen, Zhidong. 1986. "Lun woguo canjia 'huashengdun tiaoyue'" [An Analysis on Our Participation in the Washington Convention], *Fa Xu* [Legal Science] 3:11-13.
- Chinalawinfor Net. 2001a. "Zhongguo canyu WTO zhengduan jie jue jizhi de licheng" [The Journey of China's Participating in the WTO Dispute Settlement Regime]. *Chinalawinfor Net*: <http://www.chinalawinfo.com/wto/wtodjftdetail.asp?djftid=1>. Accessed: 02/24/2013.
- _____. 2001b. "Zhang Yuqing fangtan" [Interview of Zhang Yuqing]. *Chinalawinfor Net*: <http://www.chinalawinfo.com/wto/wtodjftdetail.asp?djftid=3>. Accessed: 02/24/2013.
- China Net. 2010. "Qinlizhe jiangshu: 'gongtong dan youqubie' yuanze de youlai" [The Origin of the Common but Differentiated Responsibilities Principle]. Available: http://www.china.com.cn/international/txt/2010-09/10/content_20905529.htm. Accessed: 07/24/2013.
- Chong, Dennis. 1995. "Rational Choice Theory's Mysterious Rivals." *Critical Review* 9 (1-2): 37-57.
- Coalition for International Criminal Court. <http://www.iccnw.org/?mod=cicchistory>. Accessed: 04/05/2013.
- Cooley, Alexander, and Hendrik Spruyt. 2009. *Contracting States: Sovereign Transfers in International Relations*. Princeton: Princeton University Press.
- CTBTO. <http://ctbto.org/verification-regime/background/overview-of-the-verification-regime/>. Accessed: 07/24/2013.
- Deitelhoff, Nicole. 2009. The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case. *International Organization* 63 (01): 33.
- Deng Xiaoping. 1993. "Guoji xingshi he jingji wenti" [International Situation and Economic Issues]. In Deng, Xiaoping. 1993. *Deng Xiaoping wenxuan* [Selected Works of Deng Xiaoping], the 3rd volume. Beijing: People Press: 353-356.
- Diez, Thomas. 2005. "Constructing the Self and Changing Others: Reconsidering 'Normative Power Europe'." *Journal of International Studies* 33 (3): 613-636.

- Dolzer, Rudolph and Margrete Stevens. 1995. *Bilateral Investment Treaties*. Boston: Martinus Nijhoff Publishers.
- Duan, Jielong. 1987. "Qianxi guoji touzi zhengduan de fanwei yu guoji zhongcai" [An Analysis on the Scope of International Investment Disputes and International Arbitration]. *Waijiao pinglun* [Foreign Affairs Review] 1: 36-43.
- Dunne, Tim. 2008. "Good Citizen Europe". *International Affairs* 84 (1): 13-28.
- Economy, Elizabeth, and Michel Oksenberg ed. 1999. *China Joins the World: Progress and Prospects*. New York: Council on Foreign Relations Press
- Elkins, Zachary, Andrew T. Guzman, and Beth A. Simmons. 2006. "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000." *International Organization* 60 (4): pp. 811-846.
- Feng, Hui. 2006. *The Politics of China's Accession to the World Trade Organization: the Dragon Goes Global*. New York: Routledge.
- Ferejohn, John, and Debra Satz. 1995. "Unification, Universalism, and Rational Choice Theory." *Critical Review* 9 (1-2): 71- 84.
- Fewsmith, Joseph. 2000. "The Politics of China's Accession to the WTO". *Current History* 99: 268-273.
- Fewsmith, Joseph and Stanley Rosen. 2001 "The domestic context of Chinese foreign policy: does 'public opinion' matter?" in David M. Lampton ed., *The Making of Chinese Foreign and Security Policy in the Era of Reform, 1978-2000*. Stanford: Stanford University Press, pp. 151-187.
- Finnemore, Martha, and Kathryn Sikkink. 1998. "International Norm Dynamics and Political Change." *International Organization* 52 (04): 887-917.
- Foot, Rosemary. 2000. *Rights beyond Borders: The Global Community and the Struggle over Human Rights in China*. New York: Oxford University Press.
- Foot, Rosemary, and Andrew Walter. 2011. *China, the United States, and Global Order*. New York: Cambridge University Press. F
- Fravel, M. Taylor. 2008. *Strong Borders, Secure Nation: Cooperation and Conflict in China's Territorial Disputes*, Princeton: Princeton University Press.
- Gann, Pamela B. 1985. "The U.S. Bilateral Investment Treaty Program". *Stanford Journal of International Law* 21 (2): 373-460.

- Gao, Zhiguo. 1985. "Guoji haidi wenti de xinbianhua" [New Changes of International Seabed Problems], *Zhengfa Luntan* [Political Science and Law Tribune], no. 4, pp. 45-52.
- Gao, Mingxuan, and Xiumei Wang. 2004. "Jianli guoji xingshi fayuan de falv yiyi" [the Legal Significance of the Establishment of the ICC]. *Jilin Daxue Shehui Kexue Xuebao* [Jilin University Journal Social Sciences Edition] (3): 16-21.
- Ginsburg, Thomas. 2005. "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance." *International Review of Law and Economics* 25: 107-123.
- Global Times. 2013. "Guoji fating yu qiangxing zhongcai nanhai zhengduan, riji tingzhang renming faguan" [The ITLOS will Arbitrate the Disputes in South China Sea, Japanese Judge Appointed Arbitration Tribunal]. Available: <http://world.huanqiu.com/exclusive/2013-03/3765916.html>. Accessed: 07/24/2013.
- Goodliffe, Jay, and Darren Hawkins. 2009. A Funny Thing Happened on the Way to Rome: Explaining International Criminal Court Negotiations. *The Journal of Politics* 71 (03): 977.
- Goldstein, Judith, and Robert Keohane. 1993. "Ideas and Foreign Policy: An Analytical Framework." In Judith Goldstein and Robert Keohane eds. *Ideas and Foreign Policy: Beliefs, Institutions and Political Changes*. Ithaca, NY: Cornell University Press, pp. 3-30.
- Goldstein, Judith, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter. 2000. "Introduction: Legalization and World Politics." *International Organization* 54 (3): 385-99.
- Green, Donald P., and Ian Shapiro. 1994. *Pathologies of Rational Choice: A Critique of Applications in Political Science*. New Haven: Yale University Press.
- Gruber, Lloyd. 2000. *Ruling the World: Power Politics and the Rise of Supranational Institutions*. Princeton, N.J.: Princeton University Press.
- Guzman, Andrew T. 1998. "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties." *Virginia Journal of International Law* 38: 639-688.
- Huang, Fang. 2000. "Guoji fanzui de guonei lifa daolun" [An Analysis on Domestic Legislation of International Crimes]. *Faxue Pinglun* [Law Review] (2): 39-45.
- Huang, Huang. 2007. *Qinli yu Jianwen: Huang Hua Huiyilu* [Experiences and Insights: Huang Hua's Memoir] Beijing: World Knowledge Press.
- Human Rights Watch. <http://www.hrw.org/node/79288>. Accessed: 04/05/2013.
- Hurd, Ian. 2007. *After Anarchy: Legitimacy and Power in the United Nations Security Council*. Princeton, N.J.: Princeton University Press.

- International Centre for the Settlement of Investment Disputes. 1965. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States. <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm>. Accessed: 02/26/2013.
- International Criminal Court. http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx. Accessed: 04/05/2013.
- _____. 2001. *Rome Statute of the International Criminal Court*. The Hague: International Criminal Court.
- Jackson, Robert H. 1990. *Quasi-states: Sovereignty, International Relations, and the Third World*. New York: Cambridge University Press.
- Jacobson, Harold K. and Michel Oksenberg. 1990. China's Participation in the IMF, the World Bank, and GATT: toward a Global Economic Order. Ann Arbor: University of Michigan Press.
- James, Alan. 1999. "The Practice of Sovereign Statehood in Contemporary International Society." *Political Studies* 47 (3): pp. 457-473.
- Jepperson, Ronald J., Alexander Wendt and Peter Katzenstein. 1996. "Norms, Identity, and Culture in National Security," in Peter J. Katzenstein, ed., *The Culture of National Security*. New York: Columbia University Press, pp. 33-75.
- Ji, Guoxing. 1992. "Hetan shi mouqiu heli jie jue de biyouzhilu" [Negotiation Is a Necessary Way to Solve the Disputes], *Guoji Zhanwang* [International Outlook], no. 20, pp. 6-8.
- Jiang Zemin. 2006. "Aiguo zhuyi he woguo zhishifenzi de shiming" [Patriotism and the Mission of Our Intellectuals]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 1st Volume. Beijing: People's Press: 120-133.
- _____. 2006. "Xizang gongzuo yao zhuhao wending he fazhan liangjian dashi" [The Work on Tibet Should Focus on Stability and Development]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 1st Volume. Beijing: People's Press: 388-402.
- _____. 2006. "Rang women gongtong dizao yige geng meihao de shijie". [Let Us Create a Better World Together]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 1st Volume. Beijing: People's Press: 476-482.
- _____. 2006. "Lun minzu gongzuo" [On Ethnic Affairs]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 1st Volume. Beijing: People's Press: 177-194.
- _____. 2006. "Jiakuai gaige kaifang he xiandaihua jianshe bufa, duoqu you zhongguo tese shehuizhuyi shiye de gengda shengli" [Speed up the Pace of Reform and Opening-up, and Achieve New Victory of the Cause of Socialism with Chinese Characteristics]. In Jiang

Zemin. 2006. *Jiang Zemin wenxuan* [*Selected Works of Jiang Zemin*], 1st Volume. Beijing: People's Press: 210-254.

_____. 2006. "Ba yige heping fanrong de shijie daidao ershiyi shiji" [Bring a Peaceful and Prosperous World to the 21st century]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [*Selected Works of Jiang Zemin*], 1st Volume. Beijing: People's Press: 330-335.

_____. 2006. "Shehuizhuyi qiantu yiran guangming" [The Future of Socialism is Still Bright]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [*Selected Works of Jiang Zemin*], 1st Volume. Beijing: People's Press: 336-339.

_____. 2006. "Chongfen baozhang renmin yifa xiangyou renquan" [Ensure the People to Fully Enjoy Human Rights According to Law]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [*Selected Works of Jiang Zemin*], 2nd Volume. Beijing: People's Press: 52-57.

_____. 2006. "Shixian guofang he jundui xiandaihua jianshe kuashiji fazhan de zhanlue mubiao" [Achieve the Strategic Goals of Modernizing Defense and Troops in the New Century]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [*Selected Works of Jiang Zemin*], 2nd Volume. Beijing: People's Press: 82-90.

_____. 2006. "Shishi 'yinjinlai' he 'zouchuqu' xiangjiehe de zhanlue" [Implementing the "Bring In" and "Going Out" Strategies]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [*Selected Works of Jiang Zemin*], 2nd Volume. Beijing: People's Press: 91-94.

_____. 2006. "Jiangqiang xinjiang ge minzu tuanjie, jianjue weihu zuguo tongyi" [Strengthen the Solidarity of All Ethnic Groups in Xinjiang, and Safeguard the Unification of the Motherland]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [*Selected Works of Jiang Zemin*], 2nd Volume. Beijing: People's Press: 157-165.

_____. 2006. "Dangqian de guoji xingshi he women de waijiao gongzuo" [The Current International Situation and Our Diplomatic Works]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [*Selected Works of Jiang Zemin*], 2nd Volume. Beijing: People's Press: 195-206.

_____. 2006. "Ershi nianlai women dang de zhuyao lishi jingyan" [Major historical experience of Our Party in the Past Twenty Years]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [*Selected Works of Jiang Zemin*], 2nd Volume. Beijing: People's Press: 250-264.

_____. 2006. "Cong zhanlue gaodu jiaqiang tong disan shijie de tuanjie hezuo" [Strengthen the Solidarity and Cooperation with the Third World at Strategic Level]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [*Selected Works of Jiang Zemin*], 2nd Volume. Beijing: People's Press: 371-375.

_____. 2006. "Guanyu guoyou qiye gaige he fazhan" [On the Reform and Development of State Owned Enterprises]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [*Selected Works of Jiang Zemin*], 2nd Volume. Beijing: People's Press: 376-391.

- _____. 2006. “Muqian xingshi he jingji gongzuo” [Current Situation and Economic Works]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 2nd Volume. Beijing: People’s Press: 421-449.
- _____. 2006. “Tongbao zhongyang zhengzhiju changwei “sanjiang” qiangkuang de jianghua” [Speech on How Politburo Members Carry Out the “Three Emphases” Activities]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 2nd Volume. Beijing: People’s Press: 519-586.
- _____. 2006. “Shizhong zuodaou ‘sange daibiao’ shi women dang de lidang zhiben, zhizheng zhiji, lilian zhiyuan” [The “Three Representatives” are the foundations of our Party, Regime, and Power]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 3rd Volume. Beijing: People’s Press: 6-33.
- _____. 2006. “Zai lianheguo qiannian shounao huiyi shang de jianghua” [Speech at the UN Millennium Summit]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 3rd Volume. Beijing: People’s Press: 107-112.
- _____. 2006. “Guojia zhuquan shi yiguo renmin chongfen xiagnshou renquan de qianti he baozhang” [State Sovereignty is the Precondition and Safeguard for the People of a State to Fully Enjoy Human Rights]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 3rd Volume. Beijing: People’s Press: 113-114.
- _____. 2006. “Jinyibu kaichuang tongyi zhanxian gongzuo de xin jumian” [Create a New Situation for the work of the United Front]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 3rd Volume. Beijing: People’s Press: 138-156.
- _____. 2006. “Zhengzhi tizhi gaige de mudi shi wanshan shehuizhuyi zhengzhi zhidu” [The Purpose of Political Reform is to Perfect the Socialist System]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 3rd Volume. Beijing: People’s Press: 233-237.
- _____. 2006. “Jinrong gongzuo de zhidao fangzhen he zhuyao renwu” [The Guideline and Main Tasks of Financial Works]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 3rd Volume. Beijing: People’s Press: 426-438.
- _____. 2006. “Zai jilie de guoji jingzheng zhong zhangwo zhudong” [Taking Initiative in Fierce International Competition]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 3rd Volume. Beijing: People’s Press: 442-460.
- _____. 2006. “Quanmian jianshe xiaokang shehui, kaichuang zhongguo tese shehuizhuyi shiye xinjumian” [Building a Well-Off Society, and Creating a New Prospect of Socialism with Chinese Characteristics]. In Jiang Zemin. 2006. *Jiang Zemin wenxuan* [Selected Works of Jiang Zemin], 3rd Volume. Beijing: People’s Press: 528-575.

- Johnston, Alastair Iain. 2003. "Is China a Status Quo Power?" *International Security* 27 (4): pp. 5-56.
- _____. 2008. *Social States: China in International Institutions, 1980-2000*. Princeton, N.J.: Princeton University Press.
- Katzenstein, Peter J. 1987. *Policy and Politics in West Germany: the Growth of a Semi-sovereign State*. Philadelphia: Temple University Press.
- Keohane, Robert O. 1984. *After Hegemony*. Princeton, N.J.: Princeton University Press.
- _____. 2002. "Ironies of Sovereignty: The European Union and the United States." *Journal of Common Market Studies* 40 (4): pp. 743-65.
- Kennedy, Scott. 2005. "China's Porous Protectionism: The Changing Political Economy of Trade Policy." *Political science quarterly* 120 (3): 407.
- Kent, Ann. 1999. *China, the United Nations, and Human Rights: the Limits of Compliance*. Philadelphia: University of Pennsylvania Press.
- _____. 2007. *Beyond Compliance: China, International Organizations, and Global Security*. Stanford, Calif.: Stanford University Press.
- Kim, Samuel S. 1994. "China and the third world in the changing world order." In *China and the world: Chinese foreign relations in the post-cold war era*. Boulder, CO: Westview Press.
- Koh, Tommy T.B. 1982. *A Constitution of the Oceans*. Available: http://www.un.org.proxy.library.cornell.edu/Depts/los/convention_agreements/texts/koh_english.pdf. Accessed: 07/22/2013.
- Koremenos, Barbara, Charles Lipson, and Duncan Snidal. 2001. "The Rational Design of International Institutions." *International Organization* 55 (4):pp. 761-99.
- Krasner, Stephen D. 1985. *Structural Conflict: The Third World Against Global Liberalism*, Berkeley and Los Angeles: University of California Press.
- _____. 1999. *Sovereignty: Organized Hypocrisy*. Princeton, N.J.: Princeton University Press.
- _____. 2001a. *Problematic Sovereignty: Contested Rules and Political Possibilities*. New York: Columbia University Press.
- _____. 2001b. "Organized Hypocrisy in Nineteenth-Century East Asia." *International Relations of the Asia-Pacific* 1 (2): pp. 173-97.
- Lake, David A. 2009. *Hierarchy in International Relations*. Ithaca, N.Y.: Cornell University Press.

- Lan, Haichang. 1988. "Woguo pizhun lianheguo haiyangfa gongyue libi" [The Benefits and Costs of Ratifying the UNCLOS for China], *Faxue pinglun* [Law Review], no. 6, pp. 33-37.
- _____. 1992. "Lianheguo haiyangfa gongyue mianlin de tiaozhan yu qianjing" [The Challenges and Prospects and UNCLOS], *Wuhan daxue xuebao* [Journal of Wuhan University], no. 5, pp. 57-63.
- Lardy, Nicholas. 2002. *Integrating China into the Global Economy*. Washington, D.C.: Brookings Institution Press.
- Legro, Jeffrey W. 1997. "Which Norms Matter? Revisiting the 'Failure' of Internationalism." *International Organization* 51 (1): 31-63.
- _____. 2005. *Rethinking the World: Great Power Strategies and International Order*. Ithaca: Cornell University Press.
- Li, Chenggang. 2012. "Yingdui guoji jingmao guize binhua, tuijin shangwu falv shiye fazhan" [Prepare for the Changes of International Economic Rules and Facilitate the Development of Business Laws]. *Guoji jingji hezuo* [International Economic Cooperation] 12: 4-6.
- Li, Hongyun. 1994. "Zhongguo yu guoji haidi kaifa zhidu" [China and the International Seabed Exploitation Regime], *Haiyang kaifa yu guanli* [Ocean Development and Management], no. 4, pp. 49-51.
- Li, Shengxiong. 2003. "Guoji xingshi fayuan shiyong luoma guiye guandian lun zhanzheng zui" [On War Crimes Based on ICC's Application of the Rome Statute]. <http://www.wufi.org.tw/%E5%9C%8B%E9%9A%9B%E5%88%91%E4%BA%8B%E6%B3%95%E9%99%A2%E9%81%A9%E7%94%A8%E3%80%8E%E7%BE%85%E9%A6%AC%E8%A6%8F%E7%B4%84%E3%80%8F%E8%A7%80%E9%BB%9E%E8%AB%96%E6%88%B0%E7%88%AD%E7%BD%AA/>. Accessed: 04/05/2013.
- Li, Shian. 2013. "'Guancha' ying ping gongxin". ["Watch" Should be Fair]. People's Net: http://paper.people.com.cn/rmrhwb/html/2013-02/06/content_1196806.htm. Accessed: 04/05/2013.
- Li, Shiguang, Daqun Liu, and Yan Ling, eds. 2006. *Guoji xingshi fayuan luoma guiye pingshi* [A Commentary on the Rome Statute of the ICC]. Beijing: Peking University Press.
- Li, Xueping. 2002. "Luoma guiye" yu guoji xingshi fayuan mianlin de falv wenti" [Legal Problems of the Rome Statute and the ICC]. *Faxue Pinglun* [Law Review] no. 6, pp. 51-9.
- Li, Yuguo. 1986. "Lun renlei gongtong jicheng caichan yuanze yu guoji haidi zhidu" [The Principle of Common Heritage of Mankind and the International Seabed Regime]. *Waijiao xueyuan xuebao* [Foreign Affairs Review] no. 2, pp. 79-86.

- Liang, Wei. 2007. Bureaucratic Politics, Interministerial Coordination and China's GATT/WTO Accession Negotiations. In Ka Zeng ed., 2007. *China's Foreign Trade Policy: the New Constituencies*. New York: Routledge: 20-39.
- Liao, Minwen. 2003. Guojia yu guoji xingshi fayuan de guoji hezuo yu sifa xiezhu yiwu shuping [Comments on the Obligations of States for International Cooperation and Judicial Assistance with the ICC]. *Xiandai Faxue [Modern Law Science]* 25 (6): 187-93.
- Liu, Daqun. 2006. Preface. In *Guoji xingshi fayuan luoma guiyue pingshi [A Commentary on the Rome Statute of the ICC]*, eds. Shiguang Li, Daqun Liu and Yan Ling, 1-5. Beijing: Peking University Press.
- Liu, Jie. 2013. "Yanlun ziyou yi zunshou falv wei jiben qianti" [Obeying Law is the Precondition for Freedom of Expression]. People's Net: http://paper.people.com.cn/rmrhwb/html/2013-02/06/content_1196803.htm. Accessed: 04/05/2013.
- Liu, Rongzi. 1995. "Guoji haiyang douzheng zhong de zhongda wenti ji woguo de duice" [Important Problems in International Maritime Struggles and China's Countermeasures], *Guoji jingji jishu yanjiu* [Studies in International Eechnology and Economy], no. 2, pp. 44-49.
- Liu, Wenzong. 1984. "Lun shenhai kuangwu ziyuan kaifa yiji yu woguo youguan de jige wenti" [On the Exploitation of Deep Seabed Resources and Some Problems for China], *Waijiao xueyuan xuebao* [Journal of Foreign Affairs College], no. 1, pp. 42-52.
- Liu, Zhongmin. 2008. "Lianheguo haiyangfa gongyue shengxiao de fumian xiaoying fenxi" [An Analysis of the negative effects of the Entry into Force of the UNCLOS], *Waijiao pinglun* [Foreign Affairs Review], no. 103, pp. 82-89.
- Long, Yongtu. 2002. "Rushi yu zhengfu zhineng zhuanbian" [The WTO Accession and the Transformation of the Government's Role]. *Dangzheng ganbu wenzhai* [Selected Works of Party and Government Cadres] 4: 7.
- _____. 2006. "Rushi wu zhounian bingfei kaifang de zhongdian" [The Fifth-Year Anniversary of the WTO Accession is not the End of Opening up]. Xinhua Net: http://news.xinhuanet.com/fortune/2006-12/10/content_5463017.htm
- Lu, Jinyong, Jinsong Yu, Chunsheng Qi, eds. 2007. *Guoji touzi tiaoyue yu xieding xinlun. [Theses on International Investment Treaties and Agreements]*. Beijing: People's Press.
- Lu, Youyi. 1987. "Woguo yinggai canjia 'Jiejue guojia yu taguo guomin jian touzi zhengduan gongyue'" [We Should Participate in the Convention on the Settlement of Disputes between States and Nationals of Other States]. *Faxue zazhi* [Law Science Magazine] 1: 42-43.
- Ma, Yuchi. 2007. "Zhongguo jinnianlai xiuding de shuangbian touzi baohu xieding pingxi" [An Analysis of China's Renegotiated Bilateral Investment Treaties]. In Lu, Jinyong, Jinsong

- Yu, Chunsheng Qi, eds. *Guoji touzi tiaoyue yu xieding xinlun*. [Theses on International Investment Treaties and Agreements]. Beijing: People's Press: 254-269.
- Manners, Ian. 2002. "Normative Power Europe: A Contradiction in Terms?" *Journal of Common Market Studies* 40 (2): 235-258.
- Manning-Cabrol, Denise. 1995. "The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors". *Law and Policy in International Business* 26 (4): 1169-1200.
- Mertha, Andrew. 2005. *The Politics of Piracy: Intellectual Property in Contemporary China*. Ithaca, NY: Cornell University Press.
- _____. 2008. *China's Water Warriors: Citizen Action and Policy Change*. Ithaca, NY: Cornell University Press.
- Miao, Lin. 1992. "Shiyong linghai yu pinlianku fa wenda" [An Interview on the Law on Territorial Sea and Contiguous Zone], *Faxue zazhi* [Law Science Magazine], no. 3, pp. 12-13.
- Ministry of Commerce, PRC. Online Database of China's BITs: <http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml>, Accessed 02/26/2013; Online Database of Trade and Investment Law and Regulations <http://www.fdi.gov.cn/pub/FDI/zcfg/zcfg2/default.jsp?type=1074>, Accessed 02/26/2013.
- Neumayer, Eric. and L. Spess. 2005. "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" *World Development* 33(10): 1567-1585.
- Oksenberg, Michel. 2001. "The Issue of Sovereignty in the Asian Historical Context." In Stephen D. Krasner, ed., *Problematic Sovereignty: Contested Rules and Political Possibilities*. New York: Columbia University Press, 83-104.
- Osiander, Andreas. 2001. "Sovereignty, International Relations, and the Westphalian Myth." *International Organization* 55 (2): 251-87. Pearson, Margaret M. 2001. "The Case of China's Accession to GATT/WTO" in Lampton, David M. ed., *The Making of Chinese Foreign and Security Policy in the Era of Reform, 1978-2000*. Stanford, CA: Stanford University Press: 337-370.
- Pearson, Margaret Meriwether. 2004. "China's WTO Implementation in Comparative Perspective: Lessons from the Literatures on Trade Policy and Regulation." *Review of International Affairs* 3 (4): 567-83.
- _____. 2006. "China in Geneva: Lessons from China's Early Years in the World Trade Organization." In Alastair I. Johnston and Robert S. Ross ed. *New Directions in the Study of China's Foreign Policy*. Stanford, California: Stanford University Press, 587-644.

- People's Net. "Lasa fasheng yangzhong saoluan" [Serious Riots Happened in Lasha]. <http://pic.people.com.cn/GB/tupian/247/7610/7611/5814341.html>. Accessed: 04/05/2013.
- Perlez, Jane. 2001. "Nuclear Tests Not Planned, China Diplomat Says" *The New York Times*. Available: <http://www.nytimes.com/2001/09/06/world/nuclear-tests-not-planned-china-diplomat-says.html>. Accessed: 07/24/2013.
- Philpott, Daniel. 2001. *Revolutions in Sovereignty How Ideas Shaped Modern International Relations*. Princeton, N.J.: Princeton University Press.
- _____. 2010. "Sovereignty", Edward N. Zalta ed., 2010. *The Stanford Encyclopedia of Philosophy*. Available: <http://plato.stanford.edu/archives/sum2010/entries/sovereignty/>. Accessed: 07/23/2013.
- Qiang Shigong. 2010. *Zhongguo Xianggang: Zhengzhi yu Wenhua Shiye [Hong Kong, China: Political and Cultural Vision]*. Beijing: SDX Joint Publishing Company.
- Reading, Michael R. 1992. "The Bilateral Investment Treaty in ASEAN: A Comparative Analysis". *Duke Law Journal* 42 (3):679-705.
- Richelson Jeffery ed., 2006. U.S. Intelligence on Russian and Chinese Nuclear Testing Activities, 1990-2000. National Security Archive Electronic Briefing Book No. 200. Available: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB200/>. Accessed: 07/24/2013.
- Risse-Kappen, Thomas, and Kathryn Sikkink. 1999. "The Socialization of International Human Rights Norms into Domestic Practices: Introduction." In Thomas Risse-Kappen, Steve C. Ropp, and Kathryn Sikkink eds. *The Power of Human Rights: International Norms and Domestic Change*. Cambridge: Cambridge University Press, 1-38.
- Salacuse, Jeswald W. and Nicholas P. Sullivan. 2005. "Do BITs Really work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain." *Harvard International Law Journal* 46: 67-130.
- Schurmann, Franz. 1968. *Ideology and Organization in Communist China*. Berkeley, CA.: University of California Press.
- Shambaugh, David. 2008. *China's Communist Party: Atrophy and Adaptation*. Berkeley, CA.: University of California Press.
- Shan Wenhua. 2007. "Ka'erwo zhuyi, lamei guojia yu guoji touzi zhongca" [The Calvo Doctrine, Latin American States and International Investment Arbitration]. In An Chen and Congyan Cai eds. 2007. *Guoji touzifa de xinfazhan yu zhongguo shaungbian touzi tiaoyue de xinshijian [The New Development of International Investment Law and the New Practices of China's Bilateral Investment Treaties]*. Shanghai: Fudan University Press: 297-314.

- Shang, Ming. 2005. "Touzi baohu xieding dui haiwai touzi de falv baozhang" [The Roles of Investment Treaties in Protecting Overseas Investment]. *Touzi Beijing* [Investment in Beijing] 8: 30-32.
- Shi, Guangsheng. 2002. "Shishi 'zouchuqu' zhanlue, tigao duiwai kaifang shuiping" [Implementing the "Going Out" Strategy and Further Opening up to the Outside World]. *Qiushi* 21: 35-36.
- Simmons, Beth A., and Allison Danner. 2010. "Credible Commitments and the International Criminal Court." *International Organization* 64 (2): pp. 225-56.
- Sorensen, Georg. 1999. "Sovereignty: Change and Continuity in a Fundamental Institution." *Political Studies* 47 (3): pp. 590-604.
- South China Morning Post. 2013. "Philippines Takes China to UN over territorial dispute." <http://www.scmp.com/news/china/article/1133765/philippines-takes-china-tribunal-over-sea-row>. Accessed: 07/24/2013.
- State Council, ed. 1994. *Taiwan wenti wenxian ziliao xuanbian* [Selected Works of the Literature on the Taiwan Issue]. Beijing: Remin Chubanshe.
- Su, Zhenxing & Xu, Shicheng. 1982. "Zhanhou Ladingmeizhou de fanba fandi fanzhi douzheng" [Latin America's post-War Struggle for Anti-hegemonism, anti-imperialism, and anti-colonialism], *Ladingmeizhou yanjiu* [Journal of Latin American Studies], no. 5, pp. 1-8.
- Sunstein, Cass. 1996. "Social Norms and Social Roles." *Columbia Law Review* 96 (4): pp. 903-968.
- Takungpao. 2012. "Jingdu yidingshu yanchang banian: zhongguo manyi dahui jieguo" [Kyoto Protocol Extended for Eight More Years: China Satisfied with the Conference]. Available: <http://news.takungpao.com/world/focus/2012-12/1312672.html>. Accessed: 07/24/2013.
- Tan, Shigui. 2003. Zhongguo yu guoji xingshi fayuan guanxi chutan [An Analysis of the Relations between China and the ICC]. In *Guoji xingshi fayuan zhuanlun* [Study on Major Issues Relating to the ICC]. eds. Bingzhi Zhao, Xiumei Wang and Sanjeewa Liyanage, 60-76. Beijing: People's Court Press.
- Thomson, Janice E. 1995. "State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical." *International Studies Quarterly* 39 (2): pp. 213-233.
- United Nations. 1962. General Assembly Resolution 1803: Permanent Sovereignty over Natural Resource. <http://daccess-ods.un.org/TMP/3398766.51763916.html>. Accessed 02/26/2013.
- _____. 1973. General Assembly Resolution 1803: Permanent Sovereignty over Natural Resource. <http://daccess-ods.un.org/TMP/5211914.77775574.html>. Accessed 02/26/2013.

- _____. 1975. *Third United Nations Conference on the Law of the Sea Official Records Vol. I*, New York: United Nations.
- _____. 1975. *Third United Nations Conference on the Law of the Sea Official Records Vol. II*, New York: United Nations.
- _____. 1975. *Third United Nations Conference on the Law of the Sea Official Records Vol. IV*, New York: United Nations.
- _____. 1976. *Third United Nations Conference on the Law of the Sea Official Records Vol. V*, New York: United Nations.
- _____. 1977. *Third United Nations Conference on the Law of the Sea Official Records Vol. VI*, New York: United Nations.
- _____. 1980. *Third United Nations Conference on the Law of the Sea Official Records Vol. XI*, New York: United Nations.
- _____. 1981. *Third United Nations Conference on the Law of the Sea Official Records Vol. XIII*, New York: United Nations.
- _____. 1980. *Third United Nations Conference on the Law of the Sea Official Records Vol. IX*, New York: United Nations.
- _____. 1982. *Third United Nations Conference on the Law of the Sea Official Records Vol. XIV*, New York: United Nations.
- _____. 1984. *Third United Nations Conference on the Law of the Sea Official Records Vol. XVI*, New York: United Nations.
- _____. 1984. *Third United Nations Conference on the Law of the Sea Official Records Vol. XVII*, New York: United Nations.
- _____. 1982. *The United Nations Convention on the Law of the Sea*.
Available: http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
Accessed: 07/22/2013.
- _____. 1984. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Available: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.
Accessed: 07/22/2013.
- _____. 1992a. *General Assembly Resolution A/RES/47/33*. New York: United Nations.
- _____. 1992b. United Nations Framework Convention on Climate Change. Available: http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf. Accessed: 07/24/2013.

- . 1993. *Summary Record of the 19th meeting of the Sixth Committee, UN Document A/C.6/48/SR.19*. New York: United Nations.
- . 1994. *Summary Record of the 18th Meeting of the Sixth Committee, UN Document A/C.6/49/SR.18*. New York: United Nations.
- . 1995a. *General Assembly Resolution A/RES/49/53*. New York: United Nations.
- . 1995b. *General Assembly Resolution A/RES/50/46*. New York: United Nations.
- . 1995c. *Summary Record of the 25th Meeting of the Sixth Committee, UN Document A/C.6/50/SR.25*. New York: United Nations.
- . 1996a. *Summary Record of the 28th Meeting of the Sixth Committee, UN Document A/C.6/51/SR.28*. New York: United Nations.
- . 1997a. *Summary Record of the 11th Meeting of the Sixth Committee, UN Document A/C.6/52/SR.11*. New York: United Nations.
- . 1997b. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*. Available: <http://unfccc.int/resource/docs/convkp/kpeng.pdf>. Accessed: 07/24/2013.
- . 1998a. *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Vol. II*. New York: United Nations.
- . 1998b. *Summary Record of the 9th Meeting of the Sixth Committee, UN Document A/C.6/53/SR.9*. New York: United Nations.
- . 1998c. *The United Nations Convention on the Law of the Sea: A Historical Perspective*. Available: http://www.un.org.proxy.library.cornell.edu/Depts/los/convention_agreements/convention_historical_perspective.htm. Accessed: 07/20/2013.
- . 2002. *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>. Accessed: 04/05/2013.
- . 2010. *Declarations and Statements of the UNCLOS*. Available: http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm. Accessed: 07/24/2013.
- . 2013a. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en. Accessed: 07/24/2013.

- _____. 2013b. http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en. Accessed: 07/24/2013.
- _____. 2012c. http://unfccc.int/kyoto_protocol/items/2830.php. Accessed: 07/24/2013.
- United Nations Conference on Trade and Development. 2003. *World Investment Report: FDI Policy for Development: National and International Perspectives*. http://unctad.org/en/Docs/wir2003_en.pdf. Accessed 02/23/2013.
- _____. 2006. *FDI from Developing and Transition Economies: Implications for Development*. http://unctad.org/en/Docs/wir2006_en.pdf. Accessed 02/23/2013.
- _____. 2007. *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*. http://unctad.org/en/Docs/iteiia20065_en.pdf. Accessed 02/23/2013.
- _____. 2012. *World Investment Report: Toward A New Generation of Investment Policies*. www.unctad.org/en/Docs/wir2012_en.pdf. Accessed 02/23/2013.
- _____. Online database of BITs: http://www.unctadxi.org/templates/DocSearch____779.aspx. Accessed 02/26/2013.
- Vandavelde, Kenneth. J. 1993. “U.S. Bilateral Investment Treaties: The Second Wave.” *Michigan Journal of International Law* 11: 621-704.
- _____. 1998. “Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties”. *Columbia Journal of Transnational Law* 36 (3): 501-528.
- Von Stein, Jana. 2008. “The International Law and Politics of Climate Change: Ratification of the United Nations Framework Convention and the Kyoto Protocol.” *Journal of Conflict Resolution* 52 (2):243-68.
- Waltz, Kenneth N. 1979. *Theory of International Politics*. Reading, Mass.: Addison-Wesley Pub. Co.
- Wang, Jisi. 1994. “International relations theory and the study of Chinese foreign policy: a Chinese perspective.” In Thomas W. Robinson, and David L. Shambaugh *Chinese foreign policy: theory and practice*. New York: Oxford University Press.
- _____. 2006. “Zhuquan fanchou zaisikao [Rethinking the Connotation of Sovereignty].” *Ouzhou [Europe]* (6): pp. 4-11.
- Wang, Liyu. 1992. “Waiguo chuanbo zai woguo linghai de tongguo zhidu” [The Rules for Foreign Ships to Pass China's Territorial Sea], *Haiyang kaifa yu guanli [Ocean Development and Management]*, no. 4, pp. 49-52.

- Wang, Xiumei. 2005. "Cong sudan qingshi fenxi guoji xingshi fayuan guanxiaquan de buchongxing yuanze" [The Complementarity of the Jurisdiction of the ICC: An Analysis from the Angle of the Situation in Sudan]. *Xiandai Faxue [Modern Law Science]* 27 (6): 180-6.
- Wang, Yizhou. 2000. "Shuli shiji zhijiaode xin zhuquanguan [Establish a New Sovereignty Perspective for the New Century]." *Liaowang xinwen zhoukan [Outlook Newsweek]* (17): pp. 8-11.
- Wang, Yuling & Wang, Xinlu. 1984. "Lamei guojia duiwai guanxi fazhan de xin quxiang" [The New Trend of Latin American States' Foreign Policies], *Ladingmeizhou yanjiu [Journal of Latin American Studies]*, no. 5, pp. 23-28.
- Wang, Zhaochun. 1994. "Chizhi jinri shengxiao de lianheguo haiyangfa gongyue" [A Delayed Entry into Force of the UNCLOS], *Haiyang shijie [Ocean World]*, no. 11, pp. 3-5.
- Wang, Zhixiong. 1993. "Woguo kaifa guoji haidi kuangwu ziyuan de biyaoxing he kexingxing" [The Necessity and Feasibility for China to Exploit International Seabed Resources], *Haiyang kaifa yu guanli [Ocean Development and Management]*, vol. 10, no. 3, pp. 40-42.
- Wang, Zonglia. 1992. "Guoji haiyangfa gongyue guoji haidi bufen de zhuyao neirong jiqi mianlin de wenti" [The International Seabed Section of the UNCLOS and Its Major Problems]. *Zhongwai faxue [Peking University Law Journal]*, no.1, pp. 10-15.
- Watson, James L. 1993. "Rites or Beliefs? The Construction of a Unified Culture in Late Imperial China," in Lowell Dittmer and Samuel S. Kim, eds., *China's Quest for National Identity*. Ithaca, N.Y.: Cornell University, pp. 80-103.
- Wendt, Alexander. 1999. *A Social Theory of International Politics*. Cambridge: Cambridge University Press.
- Wong, Wailin. 2005. "Argentina Treasurer Attorney: World Bank Claim Could Reach 80 \$USD". *Dow Jones International News*, January 21.
- Wuthnow, Joel. 2011. *Beyond the Veto: Chinese Diplomacy in the United Nations Security Council*. PhD. Dissertation. New York: Columbia University.
- Xiamen University. 2013. <http://law.xmu.edu.cn/shequ/frame.asp?tid=t093>. Accessed: 07/24/2013.
- Xiao, Hanqiang. 1991. "Woguo shenqing dengji taipingyang kuangque jinzhan qingkuang jianjie" [An Introduction of China's Application for Registering Mining Area in the Pacific Ocean], *Zhongguo dizhi [Chinese Geology]*, no. 2, pp. 23-24.
- Xiao, Xing. 1992. "Haiyang zai zhongguo diyuan zhengzhi zhong de zhuoyong" [The Role of the Seas in China's Geopolitics], *Renwen Dili*, vol. 7, no. 1, pp. 7-11.

- Xinhua Net. 2005. Fan fenlie guojia fa [the anti-secession law]. http://news.xinhuanet.com/newscenter/2005-03/14/content_2694168.htm. Accessed: 04/05/2013.
- _____. 2008. “Zhongguo renquan zhuanjia pibo dashe guoji baogao” [Chinese Human Rights Experts Criticize the Report of Amnesty International]. http://news.xinhuanet.com/newscenter/2008-04/08/content_7942462.htm. Accessed: 04/05/2013.
- _____. 2009. “1974: Mao Zedong tichu sange shijie lilun” [1974: Mao Zedong Raised the Three World Theory]. Available: http://news.xinhuanet.com/politics/2009-02/22/_10839608.htm. Accessed: 07/23/2013.
- _____. 2012. “Duoha tanpan zhongguo chi kaifang taidu, fada guojia yao shuaxian jianpai” [China Takes an Open Stance at the Doha Conference, Developed Countries Should Take the Lead]. Available: http://news.xinhuanet.com/energy/2012-11/21/c_123982655.htm. Accessed: 07/24/2013.
- Xu, Chujiang. 2004. “Guanyu guoji xingshi fayuan guanxiaquan de jige juti wenti: Jianping zhongguo zhenfu de lichang” [Some Specific Issues of the Jurisdiction of the ICC: An Analysis of Chinese Government’s Stance]. *Bijiaofa Yanjiu [Comparative Law Study]* (6): 77-84.
- Xu, Senan. 1988. “Yao zhongshi haijiang yanjiu” [We Must Pay Attention to the Studies of Sea Borders], *Zhongguo bianjiang shidi yanjiu* [Historical and Geographic Studies of China’s Borders], no. 4, pp. 18-20.
- Xu, Xin. 2012. “One China, Two Worlds: Taiwan and China’s Quest for Identity and Security.” In Peter Katzenstein ed., *Sinicization and the Rise of China: Civilizational Processes beyond East and West*. New York: Routledge, pp. 65-96.
- Yackee, Jason W. 2007. Dissertation. *Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital*.
- Yan, Hongmo. 1992. “Guanyu Zhonghua renmin gongheguo linghai yu pilianqu fa caoan de shuoming” [An Explanation on the Draft Law on PRC’s Territorial Sea and Contiguous Zone], *Zhonghua renmin gongheguo guowuyuan gongbao* [Gazette of the State Council of the People’s Republic of China], no. 3, pp. 72-75.
- _____. 1995. “Yao dali tuijin keji xinghai gongcheng” [Promoting the Project of Technological Ocean Development], *Haiyang kaifa yu guanli* [Ocean Development and Management], no. 1, pp. 1-5.
- Yang, Huijuan. 1985. “Xiandai ladingmeizhou renmin fandi douzheng de xingshi” [The current formats of Latin American People’s Struggle against Hegemonism], *Ladingmeizhou yanjiu* [Journal of Latin American Studies], no. 1, pp. 1-6.

- Yang, Jinsen. 1995. "Ba haiyang kaifa zuiwei kuashiji de guojia zhanlue" [Ocean Development Is a National Strategy for China in the 21st Century], *Haiyang kaifa yu guanli* [Ocean Development and Management], no. 1, pp. 6-11.
- Yu, Jinsong. 2007. "Guoji touzi ziyouhua, gongping daiyu he zhengduan jie jue falv wenti tantao". In Jinyong Lu, Jinsong Yu, Chunsheng Qi, eds. 2007. *Guoji touzi tiaoyue yu xieding xinlun*. [Theses on International Investment Treaties and Agreements]. Beijing: People's Press: 43-98.
- Yu, Yuancheng. 1988. "Lianheguo guoji haidi huiyi xinjinzhan" [New Development of the UN Seabed Consultation], *Haiyang kaifa yu guanli* [Ocean Development and Management], no. 4, pp. 33-38.
- Yu, Yuancheng and Li, Shingguang. 1992a. "Shenhaidi kuangqu dengji zhidu yu wo guo de shenqing (I)" [Registration Regime for Deep Seabed Mining Area and Our Application (I)], *Haiyang kaifa yu guanli* [Ocean Development and Management], vol. 9, no. 2, pp. 60-64.
- _____. 1992b. "Shenhaidi kuangqu dengji zhidu yu wo guo de shenqing (II)" [Registration Regime for Deep Seabed Mining Area and Our Application (II)], *Haiyang kaifa yu guanli* [Ocean Development and Management] vol. 9, no. 3, pp. 66-68.
- Zeng, Ka. 2007. *China's Foreign Trade Policy: The New Constituencies*. New York: Routledge.
- Zeng, Lingliang. 1999. "Guojifa fazhan de lishixing tupo: 'guoji xingshi fayuan guiyue' pingshu" [A Historical Breakthrough in the Development of International Law: An Analysis of the Rome Statute of the ICC]. *Zhongguo Shehui Kexue* [Chinese Social Science] (2): 141-52.
- Zhang, Lei. 2009. *Zhongguo yu guoji xingshi fayuan: Xianzhuang yu zhanwang* [China and the ICC: Status and Prospect]. Beijing: Zhongguo renmin gongan daxue chubanshe
- Zhang, Shengjun. 2006. "Guoji xingshi fayuan de pubian guanxiaquan yu ziyou zhuyi guoji zhixu" [the Universal Jurisdiction of the ICC and the Liberal International Order]. *Shijie Jingji Yu Zhengzhi* [World Economics and Politics] (8): 20-5.
- Zhang, Ye. 1982. "Lamei guojia wei fandui chaojidaguo haiyang baquan zuochu gongxian" [Latin American states' Contributions to the struggle against superpowers' maritime hegemonism], *Ladingmeizhou yanjiu* [Journal of Latin American Studies], no. 6, pp. 1-6.
- Zhang, Yun. 2013. "Xizang shehui maishang wenming jinbu de xin lucheng" [Tibetan Society Walking on the New Road towards Civilization and Progress]. People's Net: http://paper.people.com.cn/rmrbhwb/html/2013-02/06/content_1196803.htm. Accessed: 04/05/2013.
- Zhao, Enbo. 1995. "Xie zai gongyue shengxiao shi" [A Essay Written When the Convention is in Force], *Haiyang xinxi* [Marine Information], no. 1, pp. 2-3.

- Zhao, Bingzhi, Xiumei Wang, and Fang Huang. 2003. "Zai jiji tansuo zhong zouxiang guoji xingshi fayuan: 'guoji xingshi fayuan zhuanli' guoji xueshu yantaohui zongshu" [Doing Active Research and Walking towards the ICC: A Summary of the International Academic Symposium on the ICC]. In *Guoji xingshi fayuan zhuanli [A Study on Major Issues Relating to the ICC]*. eds. Bingzhi Zhao, Xiumei Wang and Sanjeewa Liyanage, 473-496. Beijing: People's Court Press.
- Zhao, Lihai. 1991. "Lianheguo haiyangfa gongyue de pizhun wenti" [The Ratification of the UNCLOS], *Beijing daxue xuebao* [Journal of Peking University], no. 4, pp. 52-61.
- _____. 1994. "Woguo pizhun lianheguo haiyangfa gongyue wenti" [Problems of China's Ratification of the UNCLOS], *Haiyang kaifa yu guanli* [Ocean Development and Management], no. 1, pp. 56-62.
- Zhou, Chengxin. 1987. "Dui woguo yingfou jiaru jie jue touzi zhengduan gongyue de jidian yijian" [Some Suggestions on Whether We should Participate in the Washington Convention]. *Faxue Pinglun* [Law Review] 1: 40-44.
- Zhou, Enlai. 1994. "Heping gongchu wuxiang yuanze [The Five Principles of Peaceful Coexistence]." In *Zhou Enlai Xuanji [Selected Works of Zhou Enlai]*. Beijing: People's Press.
- Zhou, Hongjun. 1995, "Woguo ying jinkuai pizhun lianheguo haiyang fa" [China Should Ratify the UNCLOS As Soon As Possible], *Faxue* [Law Science], no. 3, pp. 8-10.
- Zhou, Xiaoli. 1985. "Lianheguo yu guoji lifa" [The United Nations and International Law]. *Guoji wenti yanjiu* [International Studies], no. 4, pp. 27-64.
- Zhou, Zhonghai. 1986, "Zhuangshu jingji qu de jiance jianshi he kongzhi" [The Inspection, Monitor and Control of the EEZ], *Haiyang kaifa yu guanli* [Ocean Development and Management], no. 2, pp. 42-47.
- Zhou, Ziya. 1982. "Haiyangfa de xinfazhan jiqi shidai beijing" [New Development of the UNCLOS and its Background]. *Faxue zaizhi* [Law Science Magazine], no. 2, pp. 5-8.
- _____. 1987. "Pizhun Lianheguo Haiyangfa gongyue chuyi" [An Analysis of Ratification of the UNCLOS], *Faxue zazhi* [Law Science Magazine], no. 3, pp. 12-13.
- Zhu, Jianye. 1993. "Waiguo junjian jinru zhongguo linghai de falv wenti" [Legal Issues of Foreign Warship Entering into China's Territorial Sea], *Faxue zazhi* [Law Science Magazine], no. 3, pp. 16-17.
- Zhu, Rongji. 2009. *Zhu Rongji da jizhe wen* [Zhu Rongji Meets Media]. Beijing: People's Press.

- Zhu, Qiwu. 1983, "Lun junjian buying xiangyou wuhai tongguo quan" [Warship Shall not Enjoy the Rights of Innocent Passage], *Zhengfa Luntan* [Political Science and Law Tribune], no. 2, pp. 44-50.
- Zhu, Suli. 2007. "Political Parties in China's Judiciary." *Duke Journal of Comparative and International Law* 17: 533-60.
- Zhu, Wenqi. 2003. "Guoji xingshi fayuan de chengli he guoji xingfa de fazhan" [The Establishment of the ICC and the Development of the International Criminal Law]. *Zhengzhi Yu Falv* [Political Science and Law] (1): 148-9.